TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 417

REAL SILK HOSIERY MILLS, INC., APPELLANT,

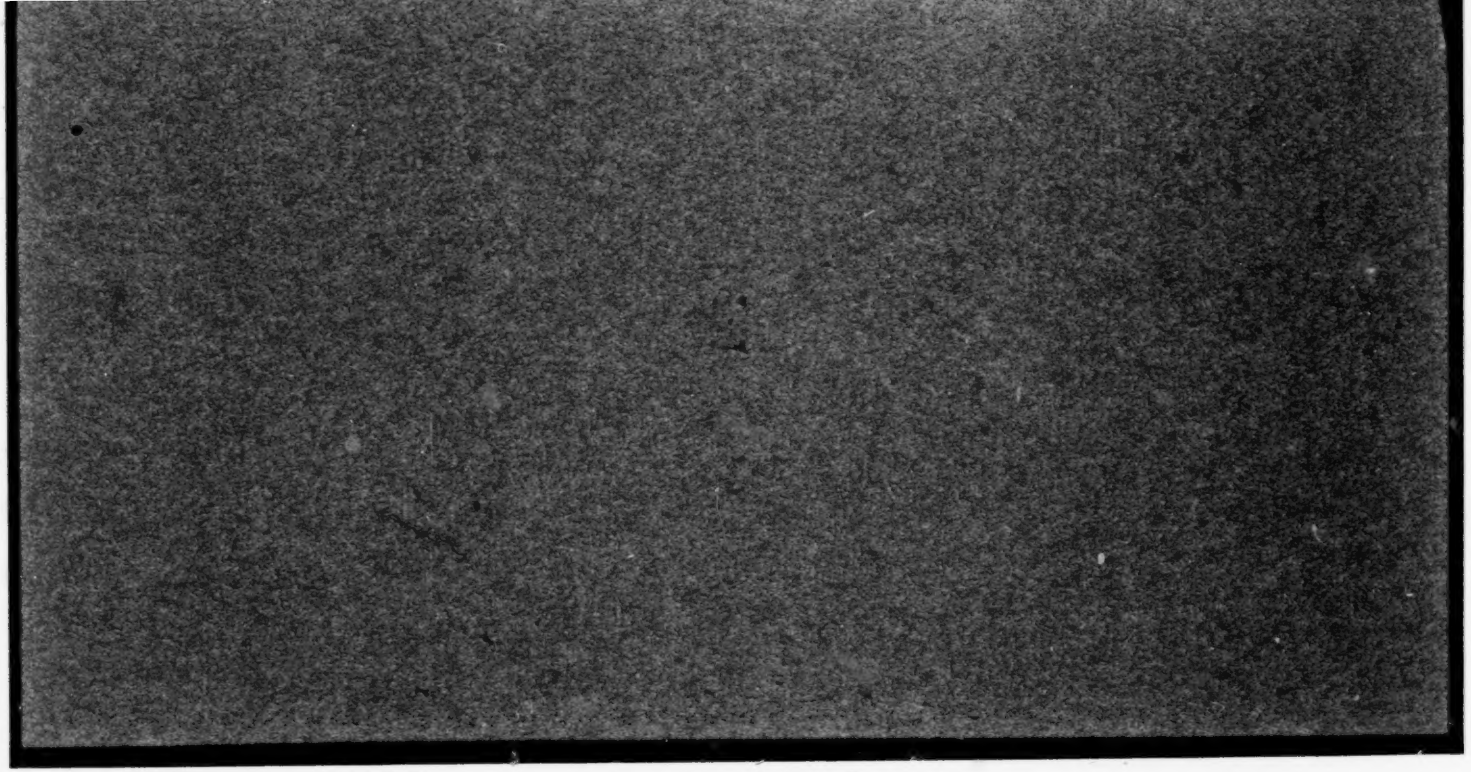
vs.

CITY OF PORTLAND, GEORGE L. BAKER, MAYOR, FRANK S. GRANT, CITY ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 6, 1939

(28,000)



(30,380)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 417

REAL SILK HOSIERY MILLS, INC., APPELLANT,

vs.

CITY OF PORTLAND, GEORGE L. BAKER, MAYOR; FRANK S. GRANT, CITY ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from the United States district court for the district of Oregon	1	1
Caption (omitted in printing)	1	1
Bill of complaint	1	1
Exhibit to Bill of Complaint—Order blanks	5	3
Motion to dismiss bill of complaint	19	8
Decree dismissing bill of complaint	20	9
Petition for and order allowing appeal	21	9
Assignment of errors	24	10
Citation (omitted in printing)	26	12
Bond on appeal (omitted in printing)	27	12
Stipulation re transcript of record	28	12
Clerk's certificate	29	12
Proceedings in the United States circuit court of appeals for the ninth circuit	31	13
Caption (omitted in printing)	31	13
Submission of cause	32	13
Order to file opinions, judgments, and decrees	33	13
Opinion, Morrow, J	35	14
Decree	55	22
Petition for appeal	56	23
Order allowing appeal	58	23
Assignment of errors	59	24
Bond on appeal (omitted in printing)	61	25
Clerk's certificate	63	25
Citation and service (omitted in printing)	64	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1924

[fol. 1] CAPTION—Omitted

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REAL SILK HOSIERY MILLS, INCORPORATED, Plaintiff and Appellant,

vs.

CITY OF PORTLAND, a Municipal Corporation; GEORGE L. BAKER, Mayor of the City of Portland; Frank S. Grant, City Attorney of the City of Portland; L. V. Jenkins, Chief of Police of the City of Portland, and J. S. Hutchinson, Inspector of Licenses of said City of Portland, Oregon, Defendants and Appellees.

BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the District of Oregon:

The Real Silk Hosiery Mills, a corporation organized and existing [fol. 2] under the laws of the State of Illinois, brings this its Bill for relief and for its cause of suit states:

I

That plaintiff is a corporation organized under the laws of the State of Illinois and a citizen of the State of Illinois.

That the defendant the City of Portland, Oregon, is and during all of the times herein mentioned has been, a municipal corporation organized and existing under the general laws of the State of Oregon;

That George L. Baker is mayor of the said City of Portland, Oregon;

That Frank S. Grant is city attorney of the said City of Portland, Oregon;

That L. V. Jenkins is chief of police of the said City of Portland, Oregon, and

That J. S. Hutchinson is license inspector of the said City of Portland, Oregon.

That said several officers are charged with the duty of enforcing the City Ordinances of the said City of Portland, Oregon, and all are citizens of the State of Oregon.

II

That this suit is between citizens of different states; that the value of the matter involved in the controversy herein exceeds the sum of $3,000.00, exclusive of interest and costs, as set forth more fully hereinafter.

III

The jurisdiction of this Court is invoked because and by reason [fol. 3] of the federal questions involved in this suit, as more fully set forth hereinafter, and the equity jurisdiction of this Court is sought to avoid a multiplicity of suits and to prevent irreparable loss and injury to the business and property of the plaintiff as hereinafter set forth and because the plaintiff has no adequate remedy at law.

IV

The Real Silk Hosiery Mills, plaintiff herein, for many years before the passage of the ordinance hereinafter mentioned was, and still is, engaged in, and was and is, carrying on the business of selling its goods, wares and merchandise, consisting of silk hosiery, in all of the states of the United States, in the manner hereinafter more specifically set forth, and not otherwise.

IVa

And plaintiff further alleges that the system adopted by plaintiff and under which it carries on its business by having its solicitors accept a small cash payment with all orders which cash payment is to be in full compensation for their servi-es, enables plaintiff to sell to its customers throughout the country at practically factory cost and is for the benefit of the customers and eliminates unnecessary and burdensome cost, expense and commissions between factory and customer. That plaintiff's business carried on under this system has been very successful. That plaintiff has two hundred and forty-five district and local sales managers' offices in the [fol. 4] United States and employs over two thousand representatives soliciting sales of hosiery in practically every city and town of importance throughout the United States, shipping more than two million packages per annum by interstate commerce, and does a business of more than ten million dollars per annum.

V

The plaintiff's principal place of business is at the City of Indianapolis, Indiana, where its goods are manufactured and prepared for shipment; and in other states where plaintiff does business, plaintiff establishes a business office known as District Sales Manager's Office, where orders are received from solicitors and forwarded to the main office of the company at Indianapolis, Indiana.

That plaintiff employs solicitors to go out and solicit orders for its hosiery and when such orders are received they are accompanied by a small cash payment, differing in amount according to the character, quality and quantity of the hosiery order.

That the deposit made by the purchaser is retained by the solicitor as payment for his services in full and is his sole compensation.

✓ Exhibit to Bill of Complaint

5

Date _____

ORDER BLANK

REAL SILK HOSIERY MILLS

MANUFACTURERS

INDIANAPOLIS, INDIANA

MARK ☒ IF REPEAT ORDER ☐

Name _____

PRINT NAME PLAINLY

Street _____

PRINT ADDRESS PLAINLY

City _____ State _____

To be delivered _____

NOTICE TO CUSTOMER:

The hosiery comes packed in boxes as listed below. Colors and sizes may be assorted to the box as desired.

The Mills require a deposit of **$1.00** on each box listed below. Your hosiery will be mailed you by Parcel Post C. O. D., direct from the Post Office branch in our Mills. "PAY THE BALANCE TO THE POSTMAN."

As the entire business of the Real Silk Hosiery Mills is conducted on the Parcel Post C. O. D. Basis, our representative cannot accept your order unless the deposit is paid.

We do not accept full payment in advance. Do not pay more than printed deposit.

MARK X FOR BOXES ORDERED		Price	Deposit Required	Balance C.O.D.
☐	Ladies' Guaranteed Hosiery. Regular Size Box of 4 Pairs	$5.50	$1.00	$4.50
☐	Men's Guaranteed Super-Service Socks Box of 6 Pairs	6.00	1.00	5.00
☐	Ladies' Guaranteed Outsize Box of 3 Pairs	5.50	1.00	4.50
☐	Combination Sample Order 2 Pairs Ladies' Regular and 2 Pairs Men's	5.00	1.00	4.00
☐	Chiffon Hosiery Box of 4 Pairs	6 00	1.00	5.00
☐	Special Combination, 2 Pairs Chiffon and 2 Pairs Ladies' Regular	5.75	1.00	4.75

Chiffon Hosiery is NOT, and cannot be guaranteed as to service on account of the delicate nature of the fabric. Our Ladies' Regular Hosiery carries our absolute guarantee.

Write Below Ladies', Chiffon Men's or Outsize	COLOR	Mark Number Pairs of Each Size								
		8	8½	9	9½	10	10½	11	11½	12

BRANCH OFFICE ADDRESS

REAL SILK HOSIERY MILLS
District Sales Manager's Office
1221-2 Gasco Building
Portland Oregon
Phone Main 5102

Total _____

Deposit Paid _____

Balance C. O. D. _____

Representative's Name _____

Date_____

ORDER BLANK

REAL SILK HOSIERY MILLS

MANUFACTURERS

INDIANAPOLIS, INDIANA

MARK R IF REPEAT ORDER ☐

Name _____
PRINT NAME PLAINLY

Street _____
PRINT ADDRESS PLAINLY

City _____ State_____

To be delivered_____

ONE DOZEN ORDER

NOTICE TO CUSTOMER:

The hosiery comes packed in Boxes as listed below. Colors and sizes may be assorted to the box as desired.

The Mill requires a deposit on each box. Your hosiery will be mailed you by Parcel Post C. O. D. direct from the Post Office branch in our Mills. "PAY THE BALANCE TO THE POSTMAN."

As the entire business of the Real Silk Hosiery Mills is conducted on the Parcel Post C. O. D. Basis, our representative cannot accept your order unless the deposit is paid.

We do not accept full payment in advance. Do not pay more than printed deposit.

MARK X FOR BOXES ORDERED		Price	Deposit Required	Balance C. O. D.
☐	Men's Super-Service Socks 1 Dozen	$12.00	$2.00	$10.00
☐	Ladies' Regular Size 1 Dozen	$16.00	$3.00	$13.00

Write below Ladies' or Men's	COLOR	Mark Number Pairs of Each Size								
		8	8½	9	9½	10	10½	11	11½	12

BRANCH OFFICE ADDRESS

REAL SILK HOSIERY MILLS
District Sales Manager's Office
1221-2 Gasco Building
Portland Oregon
Phone Main 5102

Total_____

Deposit Paid_____

Balance C. O. D. _____

Representative's Name _____

"FROM MILL TO MILLIONS"

Date_____

ORDER BLANK

REAL SILK HOSIERY MILLS

MANUFACTURERS

INDIANAPOLIS, INDIANA

Name _____
PRINT NAME PLAINLY

Street _____
PRINT ADDRESS PLAINLY

City _____ State_____

To be delivered_____

NOTICE TO CUSTOMER:

The hosiery comes packed in Boxes as listed below. Colors and sizes may be assorted to the box as desired.

The Mill requires a deposit of **50c** on each box listed below. Your hosiery will be mailed you by Parcel Post C. O. D. direct from the Post Office branch in our Mills. "PAY THE BALANCE TO THE POSTMAN."

As the entire business of the Real Silk Hosiery Mills is conducted on the Parcel Post C. O. D. Basis, our representative cannot accept your order unless the deposit is paid.

We do not accept full payment in advance. Do not pay more than printed deposit.

MARK X FOR BOXES ORDERED		Price	Deposit Required	Balance C. O. D.
☐	Ladies' Sample Order Box of 2 Pairs for	$3.00	.50	$2.50
☐	Men's Sample Order Box of 3 Pairs for	3.25	.50	2.75
☐	Chiffon Sample Order Box of 2 Pairs Ladies' Chiffon for	3.25	.50	2.75

Chiffon Hosiery is NOT, and cannot be guaranteed as to service on account of the delicate nature of the fabric. Our Ladies' Regular Hosiery carries our absolute guarantee.

Write Below Ladies', Chiffon Men's or Outsize	COLOR	Mark Number Pairs of Each Size								
		8	8½	9	9½	10	10½	11	11½	12

BRANCH OFFICE ADDRESS

REAL SILK HOSIERY MILLS
District Sales Manager's Office
1221-2 Gasco Building
Portland Oregon
Phone Main 5102

Total_____

Deposit Paid_____

Balance C. O. D._____

Representative's Name _____

"FROM MILL TO MILLIONS"

That the orders taken are upon printed blank forms furnished by plaintiff, copies of which are attached hereto:

(Here follows Exhibit to Bill of Complaint, marked side folio pages 5, 6, and 7)

[fol. 8] That upon receiving the order the solicitor returns same to the district sales manager, who in turn forwards it to the home office at Indianapolis. The order is filled in Indianapolis and shipped by Parcel Post C. O. D. direct to the purchaser. In no instance would goods go to the district sales manager's office, or otherwise than as through Parcel Post C. O. D. direct to the purchaser.

That in the City of Portland alone, plaintiff has twenty (20) solicitors operating and has many other solicitors throughout the state.

VI

That on the 21st day of December, 1921, the defendant City of Portland passed an Ordinance No. 40468, entitled an ordinance "on the regulation of private business including license and declaring an emergency," which ordinance was duly approved by the mayor on said 21st day of December, 1921. That said ordinance provides that for a violation of any of the provisions of said ordinance a fine not exceeding $1,500.00 should be imposed, or imprisonment not exceeding six months, or both fine and imprisonment.

That on the 16th day of May, 1923, said City of Portland passed an Ordinance No. 42886 amending said Ordinance No. 40468, which said Ordinance No. 42886 is in words and figures as follows, to wit:

"An Ordinance amending Ordinance No. 40468 by adding thereto [fol. 9] an article to be known as Article XLV½ and amending Section 16 of Article LII of said Ordinance, and declaring an emergency.

The City of Portland does ordain as follows:

Section 1. That Ordinance No. 40468 entitled, 'An Ordinance on the regulation of private business, including licenses, and declaring an emergency,' passed by the Council December 21, 1921, be and the same is hereby amended by adding thereto an article to be known as Article XLV½ reading as follows:

Article XLV½

Solicitors

Section 1. Definition. A solicitor within the meaning of this article is defined to be any person who goes from house to house or from place to place in the City of Portland, selling or taking orders for, or offering to sell or take orders for goods, wares or merchandise

or any article for future delivery, or for services to be performed in the future, or for the making, manufacturing or repairing of any article or thing whatsoever for future delivery, provided, however, that this article shall apply only to solicitors who demand, accept or receive payment or deposit of money in avdance of final delivery.

Section 2. License. It shall be unlawful for any person to act as a solicitor within the meaning and application of this article without [fol. 10] first securing a license from the Bureau of Licenses so to do

Section 3. Application.—Bond. Any person desiring a license to engage as a solicitor within the City of Porland, shall make application therefor to the Bureau of Licenses, on forms to be provided, stating the name and address of the applicant, the name and address of the person, firm or corporation which he represents, and the kind of goods offered for sale, or the kind of services to be performed. Such application shall be accompanied by a bond in the penal sum of $500.00 executed by a surety company or by two responsible freeholders residing in the City of Portland (or in lieu thereof a cash bond of equal amount,) conditioned upon the making of final delivery of the goods ordered, or services to be performed, in accordance with the terms of such order, or failing therein, that the advance payment on such order be refunded. Any person aggrieved by the action of any such solicitor shall have a right of action on the bond for the recovery of money or damages, or both. Such bond shall remain in full force and effect, and in case of a cash deposit, such deposit shall be retained by the City of Portland, for a period of ninety days after the expiration of any such license, unless sooner released by the Council.

Section 4. Orders. All orders taken by licensed solicitors shall be [fol. 11] in writing in duplicate, stating the terms thereof and the amount paid in advance, and one copy shall be given to the purchaser.

Section 2. That Section 16 of Article LII of said Ordinance No. 40468 be and the same is hereby amended by adding in proper alphabetical order the following:

Solicitor.—One who demands, receives, or accepts payment or deposit in advance of final delivery:

Those on foot	Quarterly,	$12.50
	Monthly,	5.00
Those using a vehicle	Quarterly,	$25.00
	Monthly,	10.00

Section 3. Inasmuch as this Ordinance is necessary for the immediate preservation of the public health, peace and safety of the City of Portland in this: That a condition now exists whereby in the past frauds have been perpetrated upon the public by certain solicitors, and which condition requires immediate remedy, therefore an emergency is hereby declared to exist and this ordinance shall be in force and effect from and after its passage by the Council.

Passed by the Council May 16, 1923.
Geo. L. Baker, Mayor of the City of Portland.

Attest: Geo. R. Funk, Auditor of the City of Portland.
Com. Pier."

[fol. 12] That said Ordinance 40468 as amended by Ordinance 42886 is still in force in the City of Portland, Oregon, and unrepealed.

VII

That said Ordinance No. 40468 as amended by said Ordinance No. 42886 in the enactment and provisions thereof undertakes and atempts to, and if it be permitted to be enforced and given effect, will, abridge the privileges and immunities of the plaintiff and will deprive the plaintiff and other citizens of the United States of liberty and property without due process of law and will deny to the plaintiff and other citizens of the United States within the jurisdiction of the City of Portland in the State of Oregon, equal protection of the laws contrary to and in violation of the 14th Amendment to the Constitution of the United States, and more particularly said ordinance and the enactments and provisions thereof requiring the payment of a license tax, procuring a license and giving a bond, and the enactment and provisions concerning the prosecution, conviction and punishment of any person violating said ordinance are contrary to the provisions of said Article XIV and unlawfully interfere with and burden interstate commerce and are in violation of Section 8 of Article I of the Constitution of the United States.

VIII

That said ordinance and the said provisions, enactments and [fol. 13] requirements therein contained, attempts to impose upon merchants who sell their goods by taking orders for future delivery, or whose agents go about from place to place, and from house to house, selling or offering for sale for future delivery, by sample or catalogue at retail, to individual purchasers who pay a small part of the purchase price down, an unreasonable, exorbitant, discriminating and prohibitory license tax, to the detriment of said persons or companies, and to the detriment of the plaintiff in particular, and does not impose the same license tax upon, or require the same bond from other merchants selling the same goods, wares and merchandise, or engaged in the same or similar lines of business, and who sell the same goods at retail, but do not take any part of the purchase price down from the individual purchasers but sell directly and deliver immediately for cash or upon credit, without taking a part of the purchase price down; that he said ordinance and said provisions and enactments requiring a bond to be given, discriminates against the plaintiff and other persons engaged in a similar business, in favor of said other merchants who sell the

same goods from place to place and from house to house by sample or catalogue, but do not take any cash payment.

IX

That said ordinance and its enactments and provisions for a license tax and a bond is an unreasonable, prohibitory and exorbitant discrimination against the plaintiff, and persons or companies, [fol. 14] following the same usual course of business by taking orders for future delivery, by sample or catalogue, from place to place and from house to house at retail, taking a cash payment down, in favor of persons who are usually called "drummers" or traveling salesmen, who take orders for future delivery without a cash payment down, and which class of drummers or traveling salesmen are by the terms of the ordinance in question expressly exempted from the provisions thereof. That there is no reasonable or sound or just cause for discriminating between persons selling to dealers or wholesalers or jobbers, and persons who sell, as plaintiff sells, to ultimate consumers; that the said ordinance is an unlawful and unreasonable attempt to increase the cost of doing business between the producers and ultimate consumers, and thus tends to increase the cost of living and in so doing it discriminates unjustly and makes a classification without reason or equity.

X

That the plaintiff alleges as a matter of fact that it is quite apparent from the reading of the ordinance itself that the said ordinance was passed with the sole intent and purpose of preventing plaintiff, and other persons and firms engaged in a similar line of business, whether selling the same class of goods, wares and merchandise, or selling any other article, where the same is sold by taking orders for future delivery, by samples or catalogue, at retail, from place [fol. 15] to place and from house to house and taking a small cash payment at the time of the order, from engaging in business in the City of Portland, Oregon, and that it is intended to destroy and prevent the plaintiff and such other persons from doing business, and from enjoying and disposing of its property, and exercising the rights of property and of liberty, and of having equal protection of the law to which the plaintiff and all other persons in like situation are entitled, and in which they are protected by the said fourteenth amendment to the Constitution of the United States.

XI

That the value of the matter involved in this controversy is more than $3,000.00, exclusive of interest and costs, from whatever standpoint of view the matter is considered; that the amount of business done by the plaintiff in the City of Portland, Oregon, each year is in excess of $78,000.00, and that the net profits thereon far exceed the sum of $3,000.00, exclusive of interest and costs, and that if

plaintiff is required to pay the license fees required by the said ordinance, that the loss of profits and business will, without question and without doubt, far exceed the sum of $3,000.00 annually, exclusive of interest and costs, and would be a loss far exceeding that sum, both in net profits and in gross business to the plaintiff in any one year, and for many years would be an inestimable amount.

[fol. 16] XII

That the penalties, fines and imprisonments provided in the said ordinance and the bond required, are so onerous, drastic and excessive, as to deter the agents of said plaintiff from continuing in business, as they have heretofore done, and which they did prior to the enactment of the said ordinance and the threats to enforce same by the city officials who are made defendants herein. That irreparable loss and injury will occur to the property and business of the plaintiff, which cannot in any way be estimated and calculated as to the amount, and that if the constitutionality of said ordinance is tested out in a court of law, by waiting for the arrest of one or more of the agents of the plaintiff, that the business of plaintiff will be greatly embarrassed, harassed, and great loss will occur to the plaintiff and individually to its agents.

XIII

And plaintiff further alleges that plaintiff is engaged in interstate commerce between the States of Indiana and Illinois and various other states of the United States, and particularly with the State of Oregon, for the reason that the goods upon leaving plaintiff's factory in Indianapolis, Indiana, are continually in transit until they reach the ultimate consumer in various states in which it does business, and particularly in the City of Portland, Oregon; that orders which [fol. 17] are taken by the agents of the plaintiff in the City of Portland, Oregon, are sent by said agents to the District Sales Manager's office in the City of Portland, Oregon, and from there forwarded directly to the office of plaintiff in Indianapolis, Indiana.

That there is a continuity of transportation of the said goods from the time they leave the factory in the City of Indianapolis, Indiana, until they are delivered to and paid for by the ultimate consumer in the City of Portland, Oregon.

XIV

And plaintiff further alleges that the defendants, each and all of them, have threatened the agents and solicitors of this plaintiff in the City of Portland, Oregon, with arrest unless plaintiff complies with the requirements of said ordinance above set out, and said defendants will, unless restrained by this Honorable Court, cause the arrest, and punishment by fine or imprisonment, or both, of plaintiff's said agents.

XV

As all of said matters and things herein complained of are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of the plaintiff and its agents, and inasmuch as the plaintiff and its agents and others similarly situated, in the City of Portland, State of Oregon, and each of them, have no adequate remedy in the premises by the strict rules of common law, and can [fol. 18] obtain relief only in a court of equity, where matters and things of the kind and character hereinabove stated are properly cognizable and relievable, and to the end that they and each of them have suitable and adequate relief which the plaintiff can obtain only in a court of equity against the enforcement of said illegal ordinance which would deprive plaintiff of its just rights and would take its property and the property of its agents without due process of law and would interfere with interstate commerce, and to the end therefore that the said defendants and each of them may, if they can, show why the plaintiff should not have the relief herein prayed for, and may have full, true, direct and perfect answer made to all and singular the matters herein set forth as if particularly interrogated thereunder, but not under oath, their oaths to such answer or answers, being hereby expressly waived, the plaintiff prays as follows:

(1) That the plaintiff have the relief of a writ of permanent injunction, enjoining and restraining the defendants and each of them and their deputies and other persons acting by or under their authority, and all other persons, from applying and enforcing the said ordinance against the plaintiff or its agents, servants or employees in the City of Portland, State of Oregon, for the reason that the said company is engaged in interstate commerce;

(2) That the plaintiff and its agents, servants and employees may [fol. 19] have such other and further relief in the premises as in equity may pertain and may to the Court seem meet.

(3) That a writ or writs of subpœna may issue to said defendants and each of them, requiring them to appear upon a day or days therein specified, and answer this Bill of Complaint fully and truthfully but not on oath, oath being hereby expressly waived, and they, and each of them be required to abide by and perform what the Court shall deem fit in the premises.

Dolph, Mallory, Simon & Gearin, Edgar Freed, Attorneys and Solicitors for Plaintiff and Appellant.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed Oct. 27, 1923

Come now the defendants above named by Frank S. Grant and R. A. Imlay, their attorneys, and move the Court for an order dis-

missing the Bill of Complaint herein and this suit upon the following grounds:

1. That it appears upon the face of the complaint herein that the plaintiff is not entitled to the relief prayed for, nor to any relief.

2. That it appears upon the face of the complaint that the passage of said ordinance is within the scope of lawful power by the City of [fol. 20] Portland and the Council of said city and that said ordinance is a valid exercise of such power.

Frank S. Grant, R. A. Imlay, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

DECREE DISMISSING BILL OF COMPLAINT

On the 3rd day of December, 1923, the Court after hearing argument sustained defendants' said motion to dismiss and allowed plaintiff further time within which if it so desired to amend its complaint.

On December 24, 1923, plaintiff, by its attorneys, having announced in open Court that it did not desire to amend its complaint the Court entered its decree dismissing plaintiff's complaint and awarding the defendants judgment and decree against plaintiff for costs, which judgment and decree is as follows:

This cause at this time coming on for further hearing on motion of the defendants, for the entering of a decree herein, the plaintiff being represented by John M. Gearin, its attorney, and the defendants being represented by R. A. Imlay, deputy city attorney, and the Court having heretofore sustained defendants' motion to dismiss the complaint, and the plaintiff having declined to further plead and having elected to stand upon is complaint,

It is now therefore ordered, adjudged and decreed that the complaint of the plaintiff herein be and the same is hereby dismissed [fol. 21] and held for naught, and that the defendants have judgment against the plaintiff for their costs and disbursements incurred herein taxed and allowed at $—.

Dated this 24th day of December, 1923.

R. S. Bean, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Dec. 26, 1923

The Real Silk Hosiery Mills, Inc., plaintiff and appellant in the above-entitled cause, conceiving itself aggrieved by the judgment and decree made and entered by the above-entitled Court in the above-

entitled cause on the 24th day of December, 1923, which Judgment [fol. 22] and Decree is as follows (omitting title of court and cause):

"This cause at this time coming on for further hearing on motion of the defendants, for the entering of a decree herein, the plaintiff being represented by John M. Gearin, its attorney, and the defendants being represented by R. A. Imlay, deputy city attorney, and the Court having heretofore sustained defendants' motion to dismiss the complaint, and the plaintiff having declined to further plead and having elected to stand upon its complaint,

It is now, therefore, ordered, adjudged and decreed that the complaint of the plaintiff herein be and the same is hereby dismissed and held for naught, and that the defendants have judgment against the plaintiff for their costs and disbursements incurred herein taxed and allowed at $—.

Dated this 24th day of December, 1923.

R. S. Bean, Judge."

does hereby appeal from the said judgment and decree, and from the whole and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said Real Silk Hosiery Mills, Inc. files herewith its assignments of errors asserted and intended to be urged upon this its said appeal and the said Real Silk Hosiery Mills, Inc., plaintiff and appellant, prays that this [fol. 23] its petition for said appeal, and that its said appeal, may be allowed and that citation issue herein as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and also, that an order be made fixing the amount of security which the said plaintiff and appellant shall give and furnish upon this its said appeal, and your petitioner will ever pray.

Dolph, Mallory, Simon & Gearin, Edgar Freed, Solicitors and Attorneys for Plaintiff and Appellant, Real Silk Hosiery Mills, Inc.

The foregoing Petition for allowance of appeal is granted and the said appeal is allowed as prayed, upon giving of a bond in the sum of Five Hundred Dollars ($500.00) to be approved by this Court.

Dated this 26th day of December, 1923.

R. S. Bean, Judge of said District Court.

[fol. 24] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Dec. 26, 1923

The plaintiff and appellant complains of errors in the proceedings in this cause in the District Court of the United States for the

District of Oregon, and in the decision, judgment and decree rendered, made and entered therein on the 24th day of December, A. D. 1923, and assigns the following as the errors complained of:

1. The Court erred in sustaining the motion of the defendants to dismiss the plaintiff's complaint.

2. The Court erred in not overruling the motion to dismiss plaintiff's complaint.

3. The Court erred in holding and deciding that the ordinance pleaded in plaintiff's complaint, being Ordinance No. 42886, amending Ordinance No. 40468, was a valid ordinance and that said City of Portland had power and authority to enact said ordinance and enforce it.

4. The Court erred in not holding that said Ordinance No. 42886, amending Ordinance No. 40468, was invalid.

5. The Court erred in not holding and decreeing that the business carried on by the plaintiff as set out in plaintiff's complaint constituted interstate commerce and that said Ordinance No. 42886, amending Ordinance No. 40468, was an attempt to regulate interstate commerce and impose unreasonable burdens thereon and deprive plaintiff of its property without due process of law and was [fol. 25] therefore void.

6. The Court erred in not holding that said Ordinance No. 42886, amending Ordinance No. 40468, was an attempt to deny to plaintiff the equal protection of the laws of the United States and was in violation of the XIV Amendment to the Constitution of the United States, and is in violation of Section 8, Article I of the Constitution of the United States.

7. The Court erred in not holding that said Ordinance No. 42886, amending Ordinance No. 40468, was an unlawful attempt to discriminate between plaintiff and other merchants who take orders for goods without taking a cash deposit, and in not holding that said ordinance requiring a license tax and bond from plaintiff and others doing business in a similar manner as plaintiff, is an unreasonable, prohibitory and exorbitant discrimination against the plaintiff and others doing business in a similar manner and in favor of persons usually called drummers, who take orders for future delivery without taking a cash deposit.

8. The Court erred in not entering a decree as prayed for in plaintiff's complaint and in not perpetually enjoining defendants from enforcing said Ordinance No. 42886, amending Ordinance No. 40468.

Dolph, Mallory, Simon & Gearin, Edgar Freed, Attorneys and Solicitors for Plaintiff and Appellant.

[fol. 26] CITATION—In usual form, filed Dec. 26, 1923; omitted in printing

---

[fol. 27] BOND ON APPEAL FOR $500.00—Approved and filed Dec. 26, 1923; omitted in printing

---

[fol. 28] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated by and between the plaintiff and appellant and defendants and appellees that the Clerk of the United States District Court for the District of Oregon may certify the Record on Appeal without comparing copies with the original.

Dolph, Mallory, Simon & Gearin, Edgar Freed, Solicitors and Attorneys for Plaintiff and Appellant. Frank S. Grant, R. A. Imlay, Solicitors and Attorneys for Defendants and Appellee.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed pages, numbered from 1 to 28 inclusive, are a full, true, correct and complete transcript of the record, papers, and other proceedings in the above entitled suit as are required and necessary for the hearing in the United States Circuit Court of Appeals, for the [fol. 30] Ninth Circuit, on the appeal taken by the plaintiff on December 26, 1923, from the judgment and decree entered in said District Court of the United States for the District of Oregon, on the 24th day of December, 1923, in case numbered E-8667 in equity, as the originals thereof appear of record and on file in said District Court at the City of Portland, in said District; and that the same constitute the transcript of record on appeal herein from said decree of the District Court of the United States for the District of Oregon, entered on December 24, 1923, to the United States Circuit Court of Appeals for the Ninth Circuit.

And I further certify that pursuant to the stipulation of the parties appearing in the foregoing record, I have executed this certificate without comparing the record thus certified with the original.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, at Portland, Oregon, this 27th day of December, A. D. 1923.

G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon. (Seal U. S. District Court.)

[fol. 31] CAPTION—Omitted

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4176

REAL SILK HOSIERY MILLS, INC., Appellant,

vs.

CITY OF PORTLAND, a Municipal Corporation, et al., Appellees

SUBMISSION OF CAUSE

Ordered appeal in the above entitled cause argued by Mr. John M. Gearin, counsel for the appellant, and by Messrs. Frank S. Grant and R. A. Imlay, counsel for the appellees, and submitted to the court for consideration and decision.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER TO FILE OPINIONS, JUDGMENTS AND DECREES

By direction of the Honorable William H. Hunt, William W. Morrow, and Frank H. Rudkin, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this court in each of the following entitled causes be forthwith filed by the Clerk, and that a Judgment or Decree be filed and recorded in the Minutes of this Court in each of the said causes in accordance with the opinion filed therein: * * *

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

[fol. 35] OPINION—Filed April 21, 1924

MORROW, C. J.:

Plaintiff brought suit in the lower court to enjoin defendant from enforcing, as against the plaintiff's solicitors, Ordinance No. 40468 of the City of Portland, as amended by Ordinance No. 42886, defining solicitors and requiring them to obtain a license and give a bond. Decree dismissing plaintiff's bill of complaint. Plaintiff appeals to this court.

It appears from the bill of complaint that Ordinance No. 40468 passed by the City Council on December 21, 1921, is the general license ordinance of the City of Portland, relating to the regulation and licensing of numerous businesses and occupations.

Ordinance No. 42886, passed on May 16, 1923, is an amendment added to Ordinance No. 40468. The amendment is known as Article XLV½.

In Section One a solicitor is defined as "any person who goes from house to house or from place to place in the City of Portland, selling or taking orders for, or offering to sell or take orders for goods, wares or merchandise or any article for future delivery, or for serv-[fol. 36] ices to be performed in the future, or for the making, manufacturing or repairing of any article or thing whatsoever for future delivery, provided, however, that this article shall apply only to solicitors who demand, accept or receive payment or deposit of money in advance of final delivery."

In Section Two it is provided that:

"It shall be unlawful for any person to act as a solicitor within the meaning and application of this article without first securing a license from the Bureau of Licenses so to do."

In Section Three is is provided:

"Any person desiring a license to engage as a solicitor within the City of Portland, shall make application therefor to the Bureau of Licenses, on forms to be provided, stating the name and address of the applicant, the name and address of the person, firm or corporation which he represents, and the kind of goods offered for sale, or the kind of services to be performed. Such application shall be accompanied by a bond in the penal sum of $500.00 executed by a surety company or by two responsible freeholders residing in the City of Portland (or in lieu thereof a cash bond of equal amount), conditioned upon the making of final delivery of the goods ordered, or services to be performed, in accordance with the terms of such order, or failing therein, that the advance payment on such order be refunded. Any person aggrieved by the action of any such

[fol. 37] solicitor shall have a right of action on the bond for the recovery of money or damages, or both."

Ordinance No. 40468 was further amended so as to provide a license tax for a "Solicitor" defined as "One who demands, receives, or accepts payment or deposit in advance of final delivery;"

For "Those on foot.....	Quarterly.....	$12.50
	Monthly	5.00
Those using a vehicle.....	Quarterly.....	$25.00
	Monthly	10.00"

It was further provided that:

"Inasmuch as this Ordinance is necessary for the immediate preservation of the public health, peace and safety of the City of Portland in this: That a condition now exists whereby in the past frauds have been prepetrated upon the public by certain solicitors, and which condition requires immediate remedy, therefore an emergency is hereby declared to exist and this ordinance shall be in force and effect from and after its passage by the Council."

Plaintiff alleges in its complaint that it is a corporation organized and existing under the laws of the State of Illinois, and a citizen of the State of Illinois;

That its principal place of business is at the City of Indianapolis, Indiana, where its goods are manufactured and prepared for shipment; in states where plaintiff does business, it establishes a busi-[fol. 38] ness office known as District Sales Manager's Office, where orders are received from solicitors and forwarded to the main office of the company at Indianapolis, Indiana;

That plaintiff employes solicitors to go out and solicit orders for its hosiery and when such orders are received they are accompanied by a small cash payment, differing in amount according to the character, quality and quantity of the hosiery order;

That the deposit made by the purchaser is retained by the solicitor as payment for his services in full and is his sole compensation;

That the system adopted by plaintiff and under which it carries on its business by having its solicitors accept a small cash payment with all orders, which cash payment is to be in full compensation for their services, enables plaintiff to sell to its customers throughout the country at practically factory cost, and is for the benefit of the customers, and eliminates unnecessary and burdensome cost, expense and commissions between factory and customer;

That upon receiving an order, the solicitor returns the same to the district sales manager, who in turn forwards it to the home office at Indianapolis. The order is filled in Indianapolis and shipped by parcel post C. O. D. direct to the purchaser. In no instance do goods go to the district sales manager's office, or otherwise than through parcel post C. O. D. direct to the purchaser.

[fol. 39] Plaintiff alleges that the enforcement of this Ordinance will

(1) abridge the privileges and immunities of the plaintiff;

(2) deprive plaintiff of liberty and property without due process of law;

(3) deny to plaintiff the equal protection of the laws;

(4) unlawfully interfere with and burden interstate commerce; and

(5) that the license tax it imposes is unreasonable, exorbitant, discriminating, and prohibitory.

The privileges and immunities claimed by plaintiff pertain to its business of shipping its manufactured product in interstate commerce from Indianapolis, Indiana, to purchasers at various points in the United States, particularly in this case to purchasers in Portland, Oregon, where its solicitors encounter the Ordinance under consideration, imposing a license tax on solicitors and requiring them to give a bond conditioned for the making of final delivery of the goods ordered in accordance with the form of such order, or failing therein, that the advance payment on such order be refunded.

Defendants concede that the City of Portland has no power to directly regulate, prohibit, or burden interstate commerce or rights flowing proximately therefrom; but it contends that the city may [fol. 40] enact an ordinance, under its reserve police power, which will be valid although it may indirectly affect interstate commerce, and that the ordinance in question is such an ordinance.

What limitation there is to the local police power when challenged as encountering the higher guaranties of the Federal Constitution has been a subject of much discussion, and the cases involving the question are numerous.

In Barbier v. Connolly, 113 U. S. 27, 31, Mr. Justice Field, speaking for the Supreme Court of the United States, said:

"But neither the amendment—" (the Fourteenth Amendment) "broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In Sligh v. Kirkwood, 237 U. S. 52, 58, the Supreme Court said:

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or [fol. 41] citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the state. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier

v. Connelly, 113 U. S. 27. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago, etc., Railway v. Drainage Commissioners, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. * * * And further, 'It is the most essential of powers, at times the most insistent and always one of the least [fol. 42] limitable of the powers of government.' Eubank v. Richmond, 226 U. S. 137, 142."

The purpose of the Ordinance under consideration, as alleged in the complaint, is to license and regulate the business of solicitors who go from house to house, or from place to place in the City of Portland, selling or taking orders for the sale of goods, wares, and merchandise for future delivery. The Ordinance has this limitation: that it "shall apply only to solicitors who demand, accept or receive payment or deposit of money in advance of final delivery."

Under the system adopted by plaintiff for carrying on its business, the solicitor, upon receiving such an order from the purchaser, does not send it directly to the Home Office in Indianapolis, but turns it in to the District Sales Manager in Portland, who in turn forwards it to the main office in Indianapolis where the order is filled and shipped by parcel post C. O. D. direct to the purchaser. In no instance do the goods go to the District Sales Manager's office, or otherwise than as through parcel post C. O. D. direct to the purchaser. The deposit or advance payment made by the purchaser for the goods is retained by the solicitor as payment for his services in full and is his sole compensation.

Plaintiff is not a solicitor, but a producer and a shipper. It does [fol. 43] not go from house to house, and from place to place, taking orders for the sale of goods for future delivery. It is true that the plaintiff alleges that it employs solicitors to go out and solicit orders for its hosiery, and when such orders are received, they are accompanied by a small cash payment advanced by the purchaser, differing in amount according to the character, quality, and quantity of the hosiery ordered. But it is further alleged that the deposit made by the purchaser is retained by the solicitor as payment for his services in full, and is his sole compensation. In other words, each sale is a separate and distinct service, for which the solicitor is paid in full by the purchaser, and is the solicitor's sole compensation for that service. He receives nothing from the plaintiff and has no interest in the unpaid balance, and on the other hand the plaintiff has no interest in the advance payment made by the purchaser to the solici-

tor. Its interest is in the prospective profits in shipping goods for the unpaid balance, to be collected not by the solicitor, but by parcel post upon the shipment direct to the purchaser C. O. D.

Between the solicitor and this unpaid balance due the plaintiff upon delivery of the goods ordered is the district sales manager, whose relation to the plaintiff is not disclosed, but presumably he is plaintiff's agent in the particular locality. It follows that the [fol. 44] solicitor's connection with the particular transaction terminates when he has turned in the purchaser's order to the district sales manager. The district sales manager forwards the order to the plaintiff, but no license tax or bond is required for that business or for the subsequent shipment. That shipment and the business of plaintiff to which it relates is left entirely free from taxes or other regulation by the State and by the City of Portland.

Can it be said, upon this state of facts, that the plaintiff's business in interstate commerce is subject to a burden because its independent solicitor, doing business in the City of Portland, as a solicitor, is required to pay a license tax and give a bond conditioned with respect to the faithful discharge of his obligations in carrying on that business?

In Pennsylvania Railroad Co. v. Knight, 192 U. S. 21, 27-28, a much more intimate and continuous relation between state and interstate business was held by the supreme Court separable for the purpose of local jurisdiction and regulation. In that case a cab service was maintained by the Pennsylvania Railroad Co. to take passengers to and from its terminal in the City of New York. The State of New York imposed a franchise, or license tax, upon the [fol. 45] Railroad Company for operating this cab service. The contention of the Railroad Co. was that this cab service was merely an extension of its interstate transportation, furnishing the service to those who were about to take over its lines some interstate transportation, thus commencing at the home or hotel of the passenger in New York, instead of from the ferry landing, or like service to those who had already received such interstate transportation, thus completing the transportation to their places of destination. The Supreme Court held that this cab service was rendered wholly within the State of New York, and had no contractual or necessary relation to interstate transportation. It was either preliminary or subsequent thereto. It was independently contracted for, and not necessarily connected therewith; that when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that though actually within, it is legally outside the state, and unless the interstate character is established, locality determines the question of jurisdiction.

The court refers to Coe v. Errol, 116 U. S. 517, as a case closely in point, where spruce logs had been drawn down from a place in New Hampshire and placed in a stream, also in New Hampshire, to be floated thence down the Androscoggin River to the State of Maine, there to be manufactured and sold. After they had been [fol. 46] thus drawn down and placed in the New Hampshire stream, a tax was imposed on them by the State of New Hampshire.

The validity of that tax was challenged, on the ground that the logs were in the course of transportation from New Hampshire to the State of Maine. The local tax in New Hampshire was sustained by the Supreme Court of New Hampshire, and also by the Supreme Court of the United States, on the ground that the logs had not commenced to move in interstate commerce.

The Supreme Court, after referring to this case, said, further:

"* * * many things have more or less relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where wil- the limit be placed?"

The court was of opinion that the cab service was an independent local service, preliminary or subsequent to any interstate transportation, and therefore subject to the state tax.

In the recent case of Hall v. Geiger-Jones Co., 242 U. S. 539, the [fol. 47] so-called "Blue Sky Law" of Ohio was involved in its state and interstate regulations, providing a license tax and certain prohibitions to prevent fraud in the sales of bonds and other securities. Geiger-Jones Co. and others were engaged in the business of buying and selling in Ohio investment securities of corporations of Ohio and other states, and foreign countries. The parties affected by the law objected to the statute on various grounds, among others that it conferred arbitrary power upon an officer, called a Commissioner, to grant or refuse a license; that it deprived the parties of their property without due process of law, denied them the equal protection of the law, and imposed burdens on interstate commerce. The court, commenting upon the objection that the law was a burden on interstate commerce, said:

"The provisions of the law, it will be observed, apply to dispositions of securities within the State and while information of those issued in other States and foreign countries is required to be filed (No. 6373-9), they are only affected by the requirement of a license of one who deals in them within the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose [fol. 48] an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from

regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally." (Citing cases.)

"We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the State? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the State. We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the State? Is there no point of time at which the State can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual trans- [fol. 49] portation, subjected to the jurisdiction of the State only when they are attempted to be sold to the individual purchaser? The questions are pertinent, the answer to them one way or the other, of consequence; but we may pass them, for regarding the securities as still an interstate commerce after their transportation to the State is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute."

The statute was accordingly upheld.

In Plumley v. Massachusetts, 155 U. S. 461, substantially the same question was dealt with by the Supreme Court as in the last case. The statute of Massachusetts prohibited the manufacture and sale of any article, product, or compound made in imitation of yellow butter produced from pure unadulterated milk or cream. It was provided, however, that the act should not be construed as prohibiting the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as would advise the consumer of its real character, free from coloration or ingredient that caused it to look like butter. The purpose of the statute was to prevent fraud in the sale of an article of merchandise. It was objected that it was repugnant to the Constitution of the United States in all the provisions urged upon the court in the present case, including the provision giving Congress power to regulate commerce among the states. The court [fol. 50] upheld the Massachusetts statute on the ground that the provisions of the Constitution of the United States did not compel the court to adjudge that the states had surrendered to the general Government the power to prevent fraud in the sales of property, and that the Constitution did not secure to anyone the privilege of defrauding the public.

These cases and others that might be cited make it sufficiently plain that the freedom of interstate commerce has been judicially limited in its supposed conflict with the police power of the state to such burdens as pertain directly to the movement of commerce among the several states, and not to regulations governing local business

within the state, preliminary or subsequent thereto, and does not prohibit the state by general law or local ordinance from legislating for the general welfare of the public within the state, or provide proper regulations for safeguarding the public interests or for the protection of the public against fraud and deception notwithstanding such legislation or regulation may indirectly affect interstate commerce.

In the present case the Ordinance declared that a condition existed in the City of Portland whereby frauds had been perpetrated upon the public by certain solicitors; that the condition required immediate remedy, and an emergency was declared to exist, so that the [fol. 51] Ordinance should be in force and effect from and after its passage.

There is a presumption that the declarations of the Ordinance are true, and when the contrary is not made to appear, they are so accepted by the court. Hendrick v. State of Maryland, 235 U. S. 610; Camas Stage Co., Inc., v. Kozer, 104 Oregon 600, 606. The bill of complaint in this case is unverified and is unsupported by affidavit. It is obvious that the frauds referred to were easily perpetrated by the solicitor in receiving orders from the purchaser with an advance payment, which was his full compensation, and he had but the feeble restraint of continued employment to compel him to turn in the order to the District Sales Manager. This was a great temptation, in many cases, since what he appropriated was his own, and his failure to turn in the order was not more serious than a personal neglect or omission.

The purchaser, on the other hand, had no security that the solicitor would do his duty, and was in danger of losing the advance payment unless the solicitor's business was regulated in some such way as is provided in this Ordinance. We are justified by the express terms of the Ordinance, in the absence of affidavits to the contrary, in concluding that this was the actual situation in the City of Portland when the Ordinance was adopted.

Plaintiff contends, in argument, that if this license tax is required to be paid, it will be paid by the plaintiff and will be added to the [fol. 52] price of the merchandise which the ultimate purchaser will have to pay. But the liability for this tax need not be incurred by either the solicitor or the plaintiff. They may carry on this business in Portland without a license or a bond of the plaintiff will compensate the solicitor directly, instead of indirectly, by requiring an advance payment from the purchaser. The plaintiff can sell its goods by soliciting, and collect the full amount due when delivered to the purchaser C. O. D., and then remit to the solicitor the amount due him. The Ordinance in no way interferes with such a business arrangement. But if plaintiff's present system is to be continued, what are the remedies for the prevention of fraud and deception by the solicitor? It is for the City to proceed in the usual way and impose a license tax upon the solicitor to identify him in his business and secure a fund that would reimburse the City for the supervision of such business, and require a bond, conditioned upon the making of a final delivery of the goods ordered in accordance with

the terms of the order; or, failing in this, that the advance payment on such order would be refunded to the purchaser. The license tax and bond, under these circumstances, was a reasonable and just regulation, and the amount of the tax is not shown to be unreasonable.

The purpose of the Ordinance, then, appears plain and simple and within the authority of the City of Portland to enact under its [fol. 53] police power. There may have been business rivalry, but we cannot assume, without convincing evidence, that it was all there was in the ordinance. In this aspect, it was not a violation of any of the restrictions placed upon the State relating to the free movement of property in interstate commerce. It was rather in aid of such commerce. It also appears that the business of the solicitor, while independent and self-sustaining, was only preliminary to the final and ultimate business of the plaintiff in sending forward the merchandise in interstate commerce, and for this reason is unobjectionable, as was held in Pennsylvania v. Knight, supra.

We find nothing in the objection to the Ordinance that it is not based upon a reasonable classification. The regulation applies only to solicitors engaged in soliciting orders for goods, wares, and merchandise who demand, accept, or receive payment, or take such money in advance of final delivery. This is a reasonable classification. Barbier v. Connolly, 113 U. S. 27; Flint v. Stone Tract Co., 220 U. S. 107; Tanner v. Little, 240 U. S. 369, 382; Northwest Auto Co. v. Hurlburt, 104 Oregon 398, 411.

We are of opinion that the Ordinance is within the police power of the City, and is, therefore, valid.

[fol. 54] The decree of the District Court, dismissing the bill of complaint, is therefore affirmed.

[File endorsement omitted.]

[fol. 55] In United States Circuit Court of Appeals

[Title omitted]

Appeal from the District Court of the United States for the District of Oregon

Decree—Filed April 21, 1924

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon and was duly submitted:

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL—Filed May 3, 1924

The above mentioned Appellant, Real Silk Hosiery Mills, Incorporated, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the 21st day of April, 1924, affirming the decree of the District Court of the United States for the District of Oregon, and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that this cause is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Appellant prays that an appeal as allowed it in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said Appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Dolph, Mallory, Simon & Gearin, John M. Gearin, Edgar Freed, Bamberger & Fiebleman, Solicitors and Attorneys for Appellant.

[fol. 57] [File endorsement omitted.]

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 3, 1924

It is hereby ordered that the Appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed, and that bond be given in the sum of $250.00.

Wm. W. Morrow, United Sates Circuit Judge, Ninth Circuit.

Dated: San Francisco, California, May 3, 1924.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 3, 1924

The Appellant in the above entitled cause, in connection with its Petition for appeal herein, presents and files therewith its assignment of errors, as to which matters and things it says that the decree entered herein on the 21st day of April, A. D. 1924, is erroneous, to wit:

First. The Court erred in affirming the judgment and decree appealed from of the District Court of the United States for the District of Oregon dismissing Appellant's Complaint, and in not reversing the said judgment and decree.

Second. The Court erred in holding and decreeing that the Ordinance complained of, being Ordinance No. 42886, amending Ordinance No. 40468, of the City of Portland, Oregon, is within the police powers of said City of Portland.

Third. The Court erred in holding and deciding that the Ordinance pleaded in Plaintiff's Complaint, being Ordinance No. 42886, amending Ordinance No. 40468, is a valid Ordinance and that said City of Portland had power and authority to enact said Ordinance and enforce it.

Fourth. The Court erred in not holding that said Ordinance No. 42886, amending Ordinance No. 40468, is invalid.

Fifth. The Court erred in not holding and decreeing that the [fol. 60] business carried on by the Plaintiff as set out in Plaintiff's Complaint, constituted interstate commerce and that said Ordinance No. 42886, amending Ordinance No. 49468, is an attempt to regulate interstate commerce and impose unreasonable burdens thereon and deprive Plaintiff of its property without due process of law and is therefore void.

Sixth. The Court erred in not holding that said Ordinance No. 42886, amending Ordinance No. 40468, is an attempt to deny to Plaintiff the equal protection of the laws of the United States and is in violation of the XIV Amendment to the Constitution of the United States, and is in violation of Section 8, Article I of the Constitution of the United States.

Seventh. The Court erred in not holding that said Ordinance No. 42886, amending Ordinance No. 49468, is an unlawful attempt to discriminate between Plaintiff and other merchants who take orders for good- without taking a cash deposit, and in not holding that said Ordinance requiring a license tax and bond from Plaintiff and others doing business in a similar manner as Plaintiff, is an unreasonable, prohibitory and exorbitant discrimination against the Plaintiff and

others doing business in a similar manner and in favor of persons usually called drummers, who take orders for future delivery without taking a cash deposit.

Eighth. The Court erred in not entering a decree as prayed for in Plaintiff's Complaint, and in not perpetually enjoining Defendants from enforcing said Ordinance No. 42886, amending Ordinance No. 40468.

Wherefore Appellant prays that said judgment and decree of said Circuit Court of Appeals may be reversed in all things.

John M. Gearin, Edgar Freed, Dolph, Mallory, Simon & Gearin, Bamberger & Feibleman, Solicitors and Attorneys for Appellant.

[File endorsement omitted.]

[fols. 61 & 62] Bond on Appeal for $250.00—Approved and filed May 12, 1924; omitted in printing

---

[fol. 63] In United States Circuit Court of Appeals

[Title omitted]

Clerk's Certificate

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-two (62) pages, numbered from and including 1 to and including 62, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the appellant, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of May, A. D. 1924.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 64] CITATION—In usual form, showing service on Frank S. Grant, R. A. Imlay; omitted in printing

---

Endorsed on cover: File No. 30,380. U. S. Circuit Court Appeals, 9th Circuit. Term No. 417. Real Silk Hosiery Mills, Inc., appellant, vs. City of Portland, George L. Baker, mayor; Frank S. Grant, city attorney, et al. Filed May 31, 1924. File No. 30,380.

(3506)

INDEX.

	PAGE
Statement of the Case	1
The Ordinance	3
Statement of Facts	5
Specification of Errors	8
Brief of Argument	9
I. Decisions of this Court have reduced within very narrow limits the questions raised by the record in this case	9
II. The appellant's business which is affected by the ordinance is interstate commerce	11
III. The ordinance is a direct burden on interstate commerce and therefore invalid	12
IV. Treating the ordinance as an attempted exercise of the police power, it is not only void as imposing a direct burden on interstate commerce, but because it is unreasonable, arbitrary and unnecessarily burdensome	19
V. The theory of the opinion of the Circuit Court of Appeals as to the local character of the service of the appellant's solicitors is untenable	31
VI. To single out solicitors who collect any portion of the purchase price in advance of final delivery and subject them to discriminating and hostile legislation is a violation of the equality clause of the Fourteenth Amendment	36
VII. The decree of the Circuit Court of Appeals should be reversed and the ordinance held to be invalid	37

TABLE OF CASES.

PAGE

Adams Express Co. *vs.* New York, 232 U. S. 14 20

Air-Way Electric Appliance Corporation *vs.* Day, (decided October 20th, 1924).... 9

American Express Co. *vs.* Iowa, 196 U. S. 133 30

Bowman *vs.* Chicago & North Western Ry. Co., 125 U. S. 465..... 14, 30

Brennan *vs.* Titusville, 153 U. S. 289..11, 12, 13, 14

Brown *vs.* Maryland, 12 Wheat. 419..... 9

Browning *vs.* Waycross, 233 U. S. 16..... 14

Caldwell *vs.* North Carolina, 187 U. S. 622. 14

Coe *vs.* Erroll, 116 U. S. 517..... 35

Connolly *vs.* Sewer Pipe Co., 184 U. S. 540. 36

Crenshaw *vs.* Arkansas, 227 U. S. 389..... 14, 16

Dobbins *vs.* Los Angeles, 195 U. S. 223.... 11, 25

Hall *vs* Geiger-Jones Co., 242 U. S. 539... 20, 36

La Coste *vs.* Dept. of Conservation, 263 U. S. 545..... 26

Lemke *vs.* Farmers Grain Co., 258 U. S. 50. 30

Mugler *vs.* Kansas, 123 U. S. 623..... 25

Pennsylvania R. R. Co. *vs.* Knight, 192 U. S. 21..... 35

Plumley *vs.* Massachusetts, 155 U. S. 461... 20, 36

Railroad Co. *vs.* Husen, 95 U. S. 465..... 30

Real Silk Hosiery Mills, Inc. *vs.* City of Portland, 297 Fed. 897..... 2

Rearick *vs.* Pennsylvania, 203 U. S. 507.... 14, 17

PAGE

Robbins *vs.* Shelby Taxing District, 120 U. S. 489.....9, 10, 12, 13, 29

Sioux Remedy Co. *vs.* Cope, 235 U. S. 197. 14
Stewart *vs.* Michigan, 232 U. S. 665..... 14
Stockard *vs.* Morgan, 185 U. S. 27..... 14
Stoutenburgh *vs.* Hennick, 129 U. S. 141... 14, 29

Texas Transport Co. *vs.* New Orleans, 264 U. S. 150.....10, 14, 17

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 417.

REAL SILK HOSIERY MILLS, INC.,
Appellant,

AGAINST

CITY OF PORTLAND, GEORGE L. BAKER, MAYOR, FRANK S. GRANT, CITY ATTORNEY, *et al.*

BRIEF FOR APPELLANT.

Statement of the Case.

This case comes before this Court on an appeal from a decree of the Circuit Court of Appeals for the Ninth Circuit, which affirmed a decree of the District Court for the District of Oregon, dismissing the bill of complaint of the Real Silk Hosiery Mills, Inc., the appellant herein (Transcript, p. 9).

The case was commenced by the filing of a bill of complaint praying for an injunction restraining the City of Portland, Oregon, and its officials from enforcing against the appellant an ordinance of the City, passed May 16th, 1923, which requires the payment of a license fee and the filing of a bond by any person who goes from place to place in the City of Portland taking orders for goods for

future delivery and who receives payment or a deposit of money in advance. The basis of the complaint is that the ordinance, as applied to the appellant's business, constitutes a burden on interstate commerce; deprives the appellant of its property without due process of law; denies to the appellant the equal protection of the laws; and constitutes an unreasonable, prohibitory and exorbitant discrimination against the appellant and persons or companies following the same usual course of business (Transcript, pp. 1-8). The City of Portland, the appellee herein, moved to dismiss the bill of complaint upon the ground that it appeared upon its face that the appellant was not entitled to any relief and that the passage of the ordinance was a valid exercise of the lawful power of the Council of the City. (Transcript, p. 8.)

The District Court dismissed the bill of complaint and entered a decree on December 24th, 1923. An appeal was thereupon taken from this decree to the Circuit Court of Appeals for the Ninth Circuit, and, after a hearing, that Court affirmed the decree (*Real Silk Hosiery Mills, Inc.* vs. *City of Portland,* 297 Fed. 897). The opinion of the Circuit Court of Appeals appears at pages 14-22 of the Transcript of Record.

The question involved is whether the ordinance is valid as applied to the salesmen or solicitors of the appellant in the City of Portland who are engaged solely in taking orders for its goods which are manufactured in Indianapolis, Indiana, and shipped in interstate commerce from Indianapolis direct to the purchaser in the City of Portland in fulfillment of the orders obtained by its solicitors, who at the time of taking such orders receive a deposit of money as part payment in advance for the goods to be delivered.

The Ordinance.

"An Ordinance amending Ordinance No. 40468 by adding thereto an article to be known as Article XLV½ and amending Section 16 of Article LII of said Ordinance, and declaring an emergency.

The City of Portland does ordain as follows:

Section 1: That Ordinance No. 40468 entitled, 'An Ordinance on the regulation of private business, including licenses, and declaring an emergency,' passed by the Council December 21, 1921, be and the same is hereby amended by adding thereto an article to be known as Article XLV½ reading as follows:

ARTICLE XLV½

Solicitors

Section 1. Definition. A solicitor within the meaning of this article is defined to be any person who goes from house to house or from place to place in the City of Portland, selling or taking orders for, or offering to sell or take orders for goods, wares or merchandise or any article for future delivery, or for services to be performed in the future, or for the making, manufacturing or repairing of any article or thing whatsoever for future delivery, provided, however, that this article shall apply only to solicitors who demand, accept or receive payment or deposit of money in advance of final delivery.

Section 2. License. It shall be unlawful for any person to act as a solicitor within the meaning and application of this article without first securing a license from the Bureau of Licenses so to do.

Section 3. Application.—Bond. Any person desiring a license to engage as a solicitor within the City of Portland, shall make application therefor to the Bureau of Licenses, on

forms to be provided, stating the name and address of the applicant, the name and address of the person, firm or corporation which he represents, and the kind of goods offered for sale, or the kind of services to be performed. Such application shall be accompanied by a bond in the penal sum of $500.00 executed by a surety company or by two responsible freeholders residing in the City of Portland (or in lieu thereof a cash bond of equal amount,) conditioned upon the making of final delivery of the goods ordered, or services to be performed, in accordance with the terms of such order, or failing therein, that the advance payment on such order be refunded. Any person aggrieved by the action of any such solicitor shall have a right of action on the bond for the recovery of money or damages, or both. Such bond shall remain in full force and effect, and in case of a cash deposit, such deposit shall be retained by the City of Portland, for a period of ninety days after the expiration of any such license, unless sooner released by the Council.

Section 4. Orders. All orders taken by licensed solicitors shall be in writing in duplicate, stating the terms thereof and the amount paid in advance, and one copy shall be given to the purchaser.

Section 2. That Section 16 of Article LII of said Ordinance No. 40468 be and the same is hereby amended by adding in proper alphabetical order the following:

Solicitor.—One who demands, receives, or accepts payment or deposit in advance of final delivery:

Those on foot.....	Quarterly,	$12.50
	Monthly,	5.00
Those using a vehicle...	Quarterly,	$25.00
	Monthly,	10.00

Section 3. Inasmuch as this Ordinance is necessary for the immediate preservation of

the public health, peace and safety of the City of Portland in this: That a condition now exists whereby in the past frauds have been perpetrated upon the public by certain solicitors, and which condition requires immediate remedy, therefore an emergency is hereby declared to exist and this ordinance shall be in force and effect from and after its passage by the Council.

Passed by the Council May 16, 1923.

Geo. L. Baker, Mayor of the City of Portland.

Attest: Geo. R. Funk, Auditor of the City of Portland. Com. Pier" (Transcript, pp. 3-5).

Ordinance No. 40468 enacted in December, 1921, to which the foregoing ordinance was added in May, 1923, is the general ordinance of the City of Portland relating to the regulation and licensing of numerous businesses and occupations (Transcript, p. 3).

Statement of Facts.

The appellant is a corporation organized under the laws of the State of Illinois and is engaged in the manufacture and sale of silk hosiery throughout the United States. Its mills are located at Indianapolis, Indiana, where all of its goods are manufactured, and from which place they are shipped, on orders previously received, direct to individual purchasers throughout the United States. It sells and delivers its goods direct to the consumer only. It does not sell or distribute them through commission merchants or through the retail stores (Transcript, fol. 3). To obtain orders for its goods and facilitate their direct purchase by individual purchasers throughout the United States, it employs representatives or solicitors in the various States who go from house to house in the various communities for

orders. At the time an order is taken by the solicitor an "order blank" is made out and signed in duplicate by the solicitor as the representative of the appellant, one of which is given to the purchaser. (See forms of order, Transcript, between pp. 2 and 3.)

At the time of and as a part of the transaction of giving the order, the purchaser is required to make a so-called "deposit", which constitutes a payment on account of the purchase price of the goods ordered, as is clearly shown by the order blank or contract (Transcript, fol. 4). The order blank contains the following provisions with respect to this deposit, the amount varying from fifty cents to three dollars according to the amount of the purchase:

> "The Mills require a deposit of $1.00 on each box listed below. Your hosiery will be mailed you by Parcel Post C. O. D. direct from the Post Office Branch in our Mills. PAY THE BALANCE TO THE POSTMAN.
>
> As the entire business of the Real Silk Hosiery Mills is conducted on the Parcel Post C. O. D. basis, our representative cannot accept your order unless the deposit is paid.
>
> We do not accept full payment in advance. Do not pay more than printed deposit."

The order blank contains a statement of the exact amount of the purchase price of the goods ordered and the balance that will be due on such purchase price when the goods are delivered to the purchaser C. O. D.

The amount of this deposit or payment on account of the purchase price is fixed by the appellant at the amount which it pays its representative for obtaining the order. As a matter of business convenience the representative retains the amount of

this payment or deposit thereby obviating the necessity of remitting it to Indianapolis and the payment of his compensation by remittances from that city (Transcript, p. 2).

After the order is so obtained, the representative sends it to a local or district sales manager's office in the State, which forwards it to appellant's mills at Indianapolis. Upon receipt of the order at the mills the goods ordered are packed and shipped by parcel post C. O. D. direct to the purchaser at the address stated in the order blank. In all instances they are shipped by parcel post C. O. D. direct to the purchaser; in no instance do they go to the local or district manager or any other representative of the appellant. No commission is paid or allowed to any outside agency in connection with the sale. By this method of business the appellant is enabled to furnish its goods to consumers throughout the United States at a lower price than by consigning them to commission houses or selling them to retail merchants for sale by them to the public (Transcript, p. 2).

In the development of its business as so described, the appellant has established and maintains 245 district and local sales manager's offices in the various States of the United States, through which the orders obtained by its representatives are forwarded to its mills; it employs over 2,000 representatives soliciting orders and sales of its hosiery covering practically every city and town of importance in the United States; and it has been so successful that it is shipping more than 2,000,000 packages of its hosiery a year from its mills at Indianapolis, Indiana, in interstate commerce to individual purchasers, and is doing a business of more than $10,000,000 per annum (Transcript, p. 2).

At the time that the ordinance in question was passed the appellant had and still has twenty representatives or solicitors in the City of Portland who take orders for its hosiery in the manner above set forth, which are sent to the appellant's mills at Indianapolis where they are filled and shipment made to the individual purchasers, the goods being continually in transit from the time they leave the mills until delivered to the purchaser in the City of Portland by parcel post, at which time the balance of the purchase price is paid through the Post Office Department.

Specification of Errors.

1. The Court erred in affirming the decree of the District Court dismissing the appellant's bill of complaint;
2. The Court erred in not holding and decreeing that the business carried on by the appellant and its solicitors in the City of Portland constituted interstate commerce, and that the ordinance was a direct burden thereon and was therefore in violation of Section 8 of Article I of the Constitution of the United States;
3. The Court erred in holding and deciding that the ordinance was within the police power of the City of Portland and therefore valid;
4. The Court erred in not holding and decreeing that the ordinance denied to the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF OF ARGUMENT.

I.

Decisions of this Court have reduced within very narrow limits the questions raised by the record in this case.

The following propositions, which are stated in the language of the Court, must be deemed to be firmly established:

1. That "under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted" *Air-Way Electric Appliance Corporation* vs. *Day* (decided Oct. 20, 1924).

2. That "a tax on the sale of an article imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made".

Brown vs. *Maryland,* 12 Wheaton, 419, 444.

3. That "the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce".

Robbins vs. *Shelby Taxing District,* 120 U. S. 489, p. 497.

4. That "to tax the sale of such goods, or the offer to sell them, before they are brought into the State * * * seems to us clearly a tax on interstate commerce itself".

Robbins vs. *Shelby Taxing District,* 120 U. S. 489, p. 497.

5. "That a state or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the state, prior to their introduction therein, *Stockard* vs. *Morgan,* 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. *McCall* vs. *Cal.* 136 U. S. 104."

Texas Transport Co. vs. *New Orleans,* 264 U. S. 150, p. 152.

6. "If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different states."

Robbins vs. *Shelby Taxing District,* 120 U. S. 489, p. 498.

7. That "there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a *direct burden* upon inter-

state commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." (Italics ours.)

Brennan vs. *Titusville*, 153 U. S. 289, p. 302.

8. That "It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

Dobbins vs. *Los Angeles*, 195 U. S. 223, p. 236.

II.

The appellant's business which is affected by the ordinance is interstate commerce.

The business of the appellant which the ordinance in question affects consists of the obtaining of orders for its hosiery through its representatives or solicitors in the City of Portland from individual purchasers and the fulfillment of those orders, when received by it at its mills in Indianapolis, by the shipment of the hosiery from that place direct to

the purchasers in the City of Portland. The transaction is simply a sale and delivery in one State of goods manufactured in another State upon an order previously given and transmitted to the State in which the goods are manufactured, and is in all respects interstate commerce.

Robbins vs. *Shelby Taxing District,* 120 U. S. 489;

Brennan vs. *Titusville,* 153 U. S. 289.

It is clear that the interstate character of the transaction as a whole cannot be affected by the manner in which the order may be obtained or by the terms of payment for the goods ordered; and it is immaterial whether they are paid for wholly or partly in advance or on final delivery insofar as the character of the transaction is concerned. In either case the transaction is interstate commerce and the representative of the appellant obtaining the order is engaged in interstate commerce.

III.

The ordinance is a direct burden on interstate commerce and therefore invalid.

1. The ordinance makes it unlawful for any person to go from house to house or place to place in the City of Portland and take orders for goods, wares or merchandise for future delivery, who demands, accepts or receives payment or deposit of money in advance of final delivery, without first securing a license in the manner provided. It further provides that any person desiring such a license

shall, with his application, file a bond in the penal sum of $500, conditioned upon making final delivery of the goods ordered; and further provides that such person shall pay a license tax as follows:

"Those on foot.....	Quarterly	$12.50
	Monthly	5.00
Those using a vehicle..	Quarterly	$25.00
	Monthly	10.00"

This ordinance is an attempt to regulate the appellant's solicitors who are engaged solely in interstate commerce and must be regarded therefore as a regulation of such commerce and a direct burden thereon.

This Court has consistently adhered to the doctrine that any regulation or tax imposed on the occupation of a solicitor taking orders in a State for a non-resident principal is a regulation of and direct burden on the interstate transaction involved and is therefore void.

Robbins vs. *Shelby Taxing District*, 120 U. S. 489, was the first of the so-called "solicitor or drummer cases". The Court held in that case that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce", and is not therefore subject to a license tax or other regulation by the local authorities. In *Brennan* vs. *Titusville*, 153 U. S. 289, the same principle was laid down by this Court; and these cases have been consistently adhered to and followed by this Court in its decisions relating to the validity of license and occupation taxes in any way seeking to regulate the business of solicitors representing non-resident principals; meaning by a non-resident principal one who manufactures and ships

the goods ordered in and from another State than that where the solicitor obtains the orders.

Stockard vs. *Morgan*, 185 U. S. 27;
Caldwell vs. *North Carolina*, 187 U. S. 622;
Rearick vs. *Pennsylvania*, 203 U. S. 507;
Crenshaw vs. *Arkansas*, 227 U. S. 389;
Stewart vs. *Michigan*, 232 U. S. 665;
Browning vs. *Waycross*, 233 U. S. 16;
Texas Transport Co. vs. *New Orleans*, 264 U. S. 150;
Bowman vs. *Chicago & North Western Ry. Co.*, 125 U. S. 465;
Stoutenburgh vs. *Hennick*, 129 U. S. 141;
Sioux Remedy Co. vs. *Cope*, 235 U. S. 197.

In *Brennan* vs. *Titusville* (*supra*), a city ordinance provided "that all persons canvassing or soliciting within said city orders for goods * * * or merchandise of any kind * * * shall be required to procure from the Mayor a license to transact said business", and imposed a license fee. The ordinance was held void as to a solicitor of orders for shipment in interstate commerce. The Court said:

> "Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled

that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a direct burden on interstate commerce is not open to question. In the early and leading case of *Brown* vs. *Maryland*, 12 Wheat. 419, 444, in which a state law requiring an importer to take out a license and pay $50 before he should be permitted to sell a package of imported goods, was adjudged in conflict with the commerce clause in the national Constitution, Chief Justice Marshall said:

> 'But should it be proved that a duty on the article itself would be repugnant to the Constitution it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.
>
> It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself, * * * So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made.'
>
> * * * * *

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is

> a direct charge and burden upon that business; and if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

In *Crenshaw* vs. *Arkansas* (*supra*) the question of the power of a state to impose a license tax on the business of soliciting was again before the Court. The Supreme Court of Arkansas had upheld the ordinance "because of the distinguishing feature of the ordinance as a valid exercise of the police power of the State". In reversing the judgment of the Arkansas Court, this Court said (p. 399):

> "Nor does the fact that the law now in question was alleged to have been passed in the exercise of the police power of the state make it lawful. In *Railroad Co.* v. *Husen*, 95 U. S. 465, 473, this Court said that 'the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.' "

In the same case, at page 396, in referring to the case of *Robbins* vs. *Shelby County Taxing District*, the Court said:

> "In that case, while this court recognized the power of the State to pass inspection laws to secure the due quality and measure of products and commodities and laws to regulate or restrict the sale of articles deemed injurious

to the health or morals, the principle was laid down (p. 497) that 'the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce', and it was held beyond the power of the State to impose a license tax upon the privilege of conducting such business. That case has been strictly adhered to in this court since its decision."

In *Rearick* vs. *Pennsylvania* (*supra*) an Ohio corporation employed an agent to solicit retail orders for groceries in Sunburg, Pa. The agent sent the orders to the company in Ohio which filled them and sent the groceries by railroad to its agent in Pennsylvania who delivered them to the respective purchasers and collected the cash for them. The agent then sent the money to the corporation in Ohio. The agent was convicted for violating an ordinance of Sunburg which made it unlawful to solicit orders for, sell, or deliver, at retail, either on the streets or by travelling from house to house, foreign or domestic goods, not of the parties' own manufacture or production, without a license, for which a fee was required. The Court held that the agent was engaged in interstate commerce and that the ordinance constituted a direct burden on such commerce and was void.

This Court discussed the question involved herein in the recent case of *Texas Transport & Terminal Co.* vs. *New Orleans,* 264 U. S. 150.

In that case the defendant was employed as a soliciting agent for four steamship lines, its compensation being fixed on the amount of freight charges collected by it for each of the four companies which it represented. The City of New Orleans

levied a license tax of $400 a year upon the defendant, which tax was upheld by the Supreme Court of Louisiana.

This Court in reversing the decision of the State Court said:

> "This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to the general and well established rule, which is: that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the State prior to their introduction therein, *Stockard* v. *Morgan*, 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. *McCall* v. *California*, 136 U. S. 104."

2. The ruling of these cases is conclusive in this case. The principle they lay down and apply covers all solicitors who obtain orders for interstate sales without regard to differences in the specific terms of the orders. The ordinance in this case concerns only solicitors who collect any portion of the purchase price payable in advance. But the fact that a solicitor collects a portion of the purchase price in advance at the time an order is given in accordance with the terms of the order does not change his status or function with respect to the interstate sale in connection with which his service has been rendered, or the interstate character of the sale. Whether an ordinance is a direct or incidental burden on interstate sales is not determinable by how the purchase price is payable.

It is just as direct a burden on interstate commerce to require a solicitor to secure a license and pay a tax therefor because he collects a portion of the purchase price, as it is to require a solicitor to secure a license who takes orders in connection with interstate sales where the goods are not paid for until final delivery. The burden on interstate commerce is distinctly a direct burden in both cases. This seems to us an unanswerable proposition, and it avoids the inconsistency of treating the requirement of a license as a direct burden on interstate sales when the whole purchase price is payable on delivery and as an indirect burden when a part of the purchase price is payable at the time the order is given, though they are equally lawful and legitimate modes of payment.

IV.

Treating the ordinance as an attempted exercise of the police power, it is not only void as imposing a direct burden on interstate commerce, but because it is unreasonable, arbitrary and unnecessarily burdensome.

The feature that is emphasized in all instances in which the exercise of the police power has been sustained in cases involving interstate transactions is that interestate commerce was only indirectly or incidentally affected thereby; and in no case has the exercise of the police power been upheld where it imposed a direct burden on interstate commerce. It was upon this theory that the "Blue Sky Law"

of Ohio was upheld as a valid exercise of the police power in the case of *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, referred to in the opinion of the court below; this Court holding in that case as to the securities involved, being securities brought into the State of Ohio for sale there, that "their interstate character is only incidentally affected by the statute" (p. 559).

So in the case of *Plumley* v. *Massachusetts*, 155 U. S. 461, this Court, in upholding the Massachusetts statute on the theory that it was within the power of the State to exclude from its markets and prevent the sale of articles which by reason of coloration or adulteration cheat the public into purchasing what they may not intend to buy, stated as follows (p. 472):

> "Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in *Sherlock* v. *Alling*, 93 U. S. 99, 103: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.' "

This limitation on the exercise of the police power is clearly stated in *Adams Express Co.* v. *New York*, 232 U. S. 14, in which the Court said, in considering a license tax regulating the business of expressmen, as follows (p. 31):

> "It is insisted that, under the authority of the State, the ordinances were adopted in the

exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. (Cases cited.) It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license. (Cases cited.) As was said by this Court in *Crutcher* v. *Kentucky,* 141 U. S. p. 58, 'a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it'."

If the effect of an ordinance is to impose a direct burden on interstate commerce, it cannot be sustained on any theory or pretext as a valid exercise of the police power. This we contend is the situation in this case, as shown in the last preceding point. But, in view of the fact that it is urged that the ordinance is warranted as an exercise of the police power to prevent frauds, notwithstanding the conclusiveness of the principle there discussed, we submit that, were it not so concluded and therefore an open question, the ordinance is unreasonable, arbitrary and imposes an unnecessary burden on interstate business like the appellant's.

In this connection, we call attention to the declarations in the emergency clause of the ordinance, which is Section 3, as follows:

> "Section 3. Inasmuch as this Ordinance is necessary for the immediate preservation of the public health, peace and safety of the City of Portland in this: That a condition now exists whereby in the past frauds have been perpetrated upon the public by certain solicitors, and which condition requires immediate remedy, therefore an emergency is hereby declared to exist and this ordinance shall be in force and effect from and after its passage by the Council" (Transcript, fol. 11).

This Section refers to "the public health, peace and safety" of the City of Portland. This is followed by a statement that "in the past frauds have been perpetrated upon the public by certain solicitors". Reading this in connection with Section 1, which defines the particular class of solicitors to which the ordinance applies, it may be assumed that the so-called frauds which are declared to have been perpetrated in the past and which the ordinance seeks to prevent in the future are frauds by solicitors who receive a payment in advance at the time of taking presumably fictitious orders for goods for future delivery.

Apparently any person desiring a license to engage as a solicitor within the City of Portland is entitled under the ordinance to obtain a license upon making an application on the form provided accompanied by the required bond; and the only penalty provided is for a failure to take out a license before acting as a solicitor as defined in the ordinance.

It is obvious that the direct and effective way to attack and suppress such frauds is by criminal

prosecutions. Instead of relying upon that method, however, the City of Portland resorts to the indirect method of licensing and bonding all solicitors who receive a payment in advance. But this does not really prevent or tend to prevent fraudulent acts or schemes by persons who may pretend to act as solicitors, or in any way regulate or curtail their activities. Dishonest persons with schemes to defraud the public will not take out licenses and give bonds, and will only be deterred from engaging in fraudulent practices by criminal prosecutions. The ordinance will not prevent such persons from carrying on their activities in the City of Portland, and it will accomplish little else than to harass legitimate business and those engaged in it. There is certainly no inducement for solicitors engaged in legitimate business and taking orders for the goods of manufacturers in other states to commit any frauds or practice any dishonesty through the collection of a small part of the purchase price in advance or otherwise. What possible inducement could there be for the solicitors representing such a concern as the appellant, which is conducting a large and profitable business throughout the United States, to perpetrate any frauds or in any way impose on the people of the City of Portland? The appellant's solicitors have steady employment at a rate of compensation that is presumably satisfactory to them. They carry with them printed order forms and when they obtain an order and take a deposit a receipt therefor is noted on the copy of the order blank and left with the purchaser; and this constitutes a binding obligation on the appellant to make delivery of the goods specified in the order. The purchaser thus has in his possession evidence of his payment on

account of the purchase price and a definite contract calling for the delivery of the goods upon the payment of the balance thereof, and is entitled to demand performance. There is no conceivable inducement in this transaction for the appellant's solicitors not to turn in orders obtained by them. They would gain nothing by not turning in an order as they have received their compensation for obtaining the order, and they would unquestionably lose their employment in case a customer had to apply directly to the appellant's mills for his goods. To assume, therefore, as the court below did, that the appellant's solicitors would be tempted in many cases not to turn in orders taken by them is to assume that with nothing whatever to gain they would deliberately expose themselves to discharge from their employment.

It is to be noted that the court below treated the reference in the ordinance to "certain solicitors" who were declared to have perpetrated frauds upon the public as specifically applying to the solicitors of the appellant, though there is no such intimation in the ordinance itself; and the court apparently assumed, without any proof, that the appellant's solicitors had in fact failed in many cases to turn in orders received by them, "in the absence of affidavits to the contrary" (Transcript, fol. 51). This case came before the court on a motion to dismiss the appellant's complaint, and the only facts before the court in connection with the doing of the appellant's business were those set forth therein. There was no reason or occasion for appellant to allege in its complaint that its solicitors had not failed to turn in orders taken by them and had not appropriated advance payments; and there was no necessity for the filing of any affidavits to that effect on such a motion as the first suggestion of

anything of the kind appears in the opinion of the Circuit Court of Appeals.

This Court is not bound by the recitals in the ordinance or its declared purpose.

In *Mugler* v. *Kansas*, 123 U. S. 623, this court stated, p. 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under the solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

In *Dobbins* v. *City of Los Angeles*, 195 U. S. 223, the Court said, after referring to the presumption in favor of the lawfulness of the exercise of a municipal power as follows, page 236:

> "But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In *Lawton* v. *Steele*, 152 U. S. 133, 137, Mr. Justice Brown, speaking for the court, said upon this subject:
>
> 'To justify the State in thus interposing its authority in behalf of the public, it must

> appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'

Referring particularly to interstate commerce it was said in *La Coste* v. *Dept. of Conservation,* 263 U. S. 545, at page 550:

> "This Court will determine for itself what is the necessary operation and effect of the State law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of a state will not necessarily control. Regard must be had to the substance of the measure rather than its form. (Cases cited.)"

While it is clear that the ordinance will not prevent frauds of the character referred to as dishonest persons who pose as solicitors will not take out licenses, it seeks to provide a remedy for purchasers who may not receive goods ordered by requiring the filing of a bond by licensed and presumably honest solicitors. Why should such a burden be put upon the honest solicitor who is in no way responsible for the non-delivery of the goods or the return of the advance payment? Why should he by the coercion of the law be in effect made a

guarantor of transactions in which he is only acting as an agent? Assuming that to preserve his organization the manufacturer will have to provide the bonds, that is in effect requiring him by the same coercion to furnish a bond in case of every solicitor supplementing his liability under his contracts with purchasers. Is not that, in the case of both solicitor and manufacturer, an extraordinary, arbitrary and unreasonable requirement, and an unreasonable interference with the usual methods of trade; the only justification for which that can be urged being that there may be frauds perpetrated by dishonest manufacturers or solicitors? The only clear, positive effect of the ordinance is that it will embarrass legitimate trade by stopping it or curtailing the localities in which it is carried on, or burdening it with a mass of licenses and bonds at a very considerable expense which ultimately falls upon the consumer, and this with no substantial benefit in preventing frauds or in any other direction, with the exception of the benefit to commission houses and retail merchants in the various localities who may be thereby relieved from the competition of lower prices. Obviously the legitimate business which will suffer the most from the exactions of such an ordinance is interstate business, as it is the business in which solicitors are necessary and in which they are mainly employed. We maintain that the ordinance is arbitrary, unreasonable and unnecessarily burdensome, because it is a positive and serious interference with the usual methods of trade with only an infinitesimal possibility of realizing its declared purpose. In other words there is no reasonably assured relation between the operation of the ordinance and the evil assigned for its adoption.

If the City of Portland can require one form of bond, and $50.00 annually, (or $100. if using a vehicle), as a license fee, every city, town and village in the State of Oregon and in all other States, can impose similar requirements. The possibility of thousands of such requirements, varying in details, ~~by the various municipal corporations throughout the United States, would seriously and in details~~, by the various municipalities throughout the United States, would seriously and injuriously hamper, for instance, the appellant and others similarly situated in carrying on their interstate business in a reasonable and safe manner. Indeed many townships and villages would not afford sufficient business to justify them in going to the expense and trouble of paying a license tax and furnishing a bond; and this would necessarily operate as a limitation of their activities. It seems fair to say that these conditions and their consequences will be productive of more harmful results to the public than the alleged evils sought to be reached by the ordinance in question and, following its example, similar ordinances elsewhere. The constant increase in the cost of living, and especially in the purchase price of manufactured articles distributed through middlemen or retailers, emphasizes the importance of keeping free the channels of commerce to the end that manufacturers may deal directly with the public.

Moreover, if there be any real necessity for the regulation of solicitors selling the goods of a non-resident principal it is for Congress, and not for the various States or municipalities, to pass appropriate laws for such regulation, to the end that there may be uniformity of regulation all over the country.

In *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, the Court commented on the statute there involved imposing a license tax on canvassers as follows, page 498:

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactment of forty different states."

In *Stoutenburgh* vs. *Hennick,* 129 U. S. 141, the Court, in considering a local license tax on solicitors, said at page 148:

> "That in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems; and that a State statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another State to pay license fees for permission to do so, is, in the absence of congressional action, a regulation of commerce in violation of the Constitution. The business referred to is thus definitely assigned to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. *Cooley* v. *Board of Wardens,* 12 How. 299; *Gilman* v. *Philadelphia,* 3 Wall. 713. It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the ex-

ercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality."

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, the Court, in considering a statute which required all purchasers of grain to take out licenses, said at page 58:

"It is contended that these regulations may stand upon the principles recognized in decisions of this court which permit the State to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States. This principle has no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it.

* * * * *

It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

Bowman v. *Chicago & North Western Railway Co.*, 125 U. S. 465;

American Express Co. v. *Iowa*, 196 U. S. 133;

Railroad Co. v. *Husen*, 95 U. S. 465.

V.

The theory of the opinion of the Circuit Court of Appeals as to the local character of the service of the appellant's solicitors is untenable.

1. To avoid the long line of the so-called drummer cases decided by this Court, a theory is evolved by the lower court which severs each transaction of sale into two separate and independent parts; one a transaction between the solicitor and the purchaser in which the order is taken and the compensation of the solicitor is paid by the purchaser; and the other a transaction between the appellant and the purchaser consisting of the sending and delivery of the goods and the payment of the balance of the purchase price. The first transaction is treated as a separate local service performed entirely within the State and distinct from the interstate transaction between the appellant and the purchaser. In reaching this conclusion the Court said:

> "Plaintiff is not a solicitor but a producer and a shipper. It does not go from house to house, and from place to place, taking orders for the sale of goods for future delivery. It is true that the plaintiff alleges that it employs solicitors to go out and solicit orders for its hosiery, and when such orders are received, they are accompanied by a small cash payment advanced by the purchaser, differing in amount according to the character, quality, and quantity of the hosiery ordered. But it is further alleged that the deposit made by the purchaser is retained by the solicitor as payment for his services in full, and is his sole compensation.

In other words, each sale is a separate and distinct service for which the solicitor is paid in full by the purchaser, and is the solicitor's sole compensation for that service. He receives nothing from the plaintiff and has no interest in the unpaid balance, and on the other hand the plaintiff has no interest in the advance payment made by the purchaser to the solicitor. Its interest is in the prospective profits in shipping goods for the unpaid balance, to be collected not by the solicitor, but by parcel post upon the shipment direct to the purchaser C. O. D.

Between the solicitor and this unpaid balance due the plaintiff upon delivery of the goods ordered is the district sales manager, whose relation to the plaintiff is not disclosed, but presumably he is plaintiff's agent in the particular locality. It follows that the solicitor's connection with the particular transaction terminates when he has turned in the purchaser's order to the district sales manager. The district sales manager forwards the order to the plaintiff, but no license tax or bond is required for that business or for the subsequent shipment. That shipment and the business of plaintiff to which it relates is left entirely free from taxes or other regulation by the State and by the City of Portland.

Can it be said, upon this state of facts, that the plaintiff's business in interstate commerce is subject to a burden because its independent solicitor, doing business in the City of Portland, as a solicitor, is required to pay a license tax and give a bond conditioned with respect to the faithful discharge of his obligations in carrying on that business?" (Transcript, pp. 17-18).

This is a clear misconception of the real transaction. The solicitors are employed by the appellant. Their function is to solicit orders on behalf of the appellant, and when obtained to reduce them to

writing, sign them and receive the deposit on behalf of the appellant. The orders are transmitted to the appellant through a district sales manager's office located in the City of Portland. This is the indispensable initial step in the transaction.

The total purchase price is stated in the formal order. It is the sum which the purchaser is obligated to pay to the appellant for the goods. A payment of a part of the purchase price is required in advance and is paid to the solicitor, not as money due from the purchaser to the solicitor, but as part of the purchase price of the goods. The payment required is retained by the solicitor under his arrangement with the appellant as compensation for his service rendered to the appellant. That he retains it instead of remitting it to his principal does not affect the purchaser. The solicitor's part in the sale is concluded when he receives the order and advance payment and sends the order to the district sales manager just as any travelling salesman's function in connection with a sale is performed when he has obtained an order and forwarded it to his principal. There is obviously no basis in the actual facts for the statements in the opinion of the Court below that the solicitor "receives nothing from the plaintiff", and "that the plaintiff has no interest in the advance payment made by the purchaser to the solicitor", or for the description of the solicitor as "independent", and his business as "independent and self sustaining"; or for severing the solicitor's service from each transaction of sale as an entirety and treating it as a separate and independent transaction between the purchaser and the solicitor.

The business reasons for the advance payment and its retention by the solicitor are not far to

seek. The advance payment is necessary as an inducement to the purchaser to take the goods when delivered and pay the balance of the purchase price; and in case of their rejection by the purchaser owing to a change of mind or any similar cause, to recoup the appellant for the selection and packing of the goods and the expense of forwarding them and having them returned. Without that protection the manufacturer would be at the mercy of the purchaser who declines to receive the goods he has ordered. A small advance payment at any rate saves him from actual loss; and no doubt experience has shown that it materially tends to hold the purchaser to his order. One who has paid in advance $1.00 on a $6.00 order, or $2.00 on a $12 order, or $3.00 on a $16 order is not likely to forfeit what has been paid for a whim or mere change of mind. For this reason the advance payment is indispensable. This the court below failed to appreciate when it said that the advance payment was required to compensate the solicitor indirectly and that all the appellant had to do to escape the license and bond was to cease requiring it (T. p. 21). But such a change would be the elimination of a vital factor in the appellant's business.

Facing the problem of the payment of the compensation of thousands of solicitors all over the country and an advance payment being indispensable, the natural solution of it was to fix the payment at a sum equivalent to a workable compensation to the solicitor in connection with each order and allow him to retain it, thereby saving an open account with each solicitor and remittances from him and to him. That is the rationale of the appellant's method of business in respect of the advance payment and the payment of the solicitor's compensation out of

the purchase price. It is a natural and legitimate method of business and its operation in no way converts the purely interstate sales of the business into a combination of an interstate element, consisting of the receipt of the order, the transmission of the goods by mail C. O. D. as to the balance of the purchase price, and their delivery to the purchaser on payment of such balance, and of an intrastate element consising of the obtaining of the order by the solicitor, the forwarding of it to the district manager's office for transmission to the mills, and his retention of the advance payment on the purchase price of the goods collected by him. In each instance there is simply an interstate sale beginning with the obtaining by the appellant's agent of an order with the payment of a portion of the purchase price in advance, followed by its transmission to the mills and the transmission of the goods from the mill by mail direct to the purchaser, the balance of the purchase price to be paid on delivery. The advance payment does not change the character of such an interstate sale, nor does the fact that the appellant's agent is authorized by it to retain the amount paid as his compensation for his services in obtaining the order.

2. With this correction of the facts assumed by the court below as the basis of its ruling that the solicitor's function is a separate and distinct local, intrastate service, it would not seem necessary to discuss the cases cited in support of this particular ruling—*Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21; *Coe* v. *Erroll,* 116 U. S. 517. There is no similarity or analogy between the distinctly separate services involved in that case, that is, the train service for the transportation of passengers and the cab service maintained by the Pennsylvania Rail-

way Company for the local transportation of passengers after reaching the station, and the different steps in an interstate sale from the initial obtaining of the order by the manufacturer's solicitor or agent and the delivery of the goods under the circumstances disclosed by this case. The other cases cited by the court below—*Hall* v. *Geiger-Jones Company*, 242 U. S. 539, and *Plumley* v. *Massachusetts*, 155 U. S. 461—have been referred to in the preceding point, where it is shown that they have no application to such a case as this, in which the burden on interstate commerce imposed by the ordinance is direct and not merely incidental and indirect as in the two cases cited.

VI.

To single out solicitors who collect any portion of the purchase price in advance of final delivery and subject them to discriminating and hostile legislation is a violation of the equality clause of the Fourteenth Amendment.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, at page 560, this court approved the following statement made in a previous case:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the Equality Clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Embezzlement or misappropriation is not a natural consequence of the receipt of the money of another, and the mere possibility of embezzlement or misappropriation is not a reasonable ground for a classification of solicitors.

VII.

The decree of the Circuit Court of Appeals should be reversed and the ordinance held to be invalid.

JOHN G. MILBURN,
JOSEPH W. WELSH,
RALPH BAMBERGER,
JOHN M. GEARIN,
Counsel for Appellant.

IN THE

Supreme Court

of the United States

OCTOBER TERM, 1924

No. [redacted]417

REAL SILK HOSIERY MILLS (Incorporated),
Appellant,

vs.

CITY OF PORTLAND, a Municipal Corporation; GEORGE L. BAKER, Mayor of the City of Portland; FRANK S. GRANT, City Attorney of the City of Portland; L. V. JENKINS, Chief of Police of the City of Portland; and J. S. HUTCHINSON, Inspector of Licenses of said City of Portland, Oregon,

Appellees.

Brief of Appellees

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

---

SIMON, GEARIN, HUMPHRIES & FREED,
Attorneys and Solicitors for Appellant,
Portland, Oregon.

FRANK S. GRANT, City Attorney,
ROBERT A. IMLAY, Deputy City Attorney,
Solicitors and Attorneys for Appellees,
Portland, Oregon.

PORTLAND PRINTING HOUSE CO., PORTLAND, OREGON

SUBJECT INDEX

	Page
Amount of License Fee	66
Article XLV½ of Ordinance No. 40468	2
Argument	19
Cost and Inconvenience	60
Does Ordinance Violate Commerce Clause?	57
Drummer Cases	68
Emergency Clause Section of Ordinance	4
Federal Trade Commission—Reference to	80
License Fee	65
Ordinance No. 42886	2
Points and Authorities	8
Principal Contentions Involved	7
Reasonableness of Ordinance	57
Reasonableness of Classification	60
Section 16, Article LII. of Ordinance No. 40468	4
Scope of National Legislation	80
Statement of Facts	1

TABLE OF CASES CITED

Page

A

Allen v. Riley, 203 U. S. 347, 27 Sup. Ct. Rep. 95, 51 L. ed. 216, 8 Ann. Cas. 137 ..... 14, 59

Atchison T. & S. F. R. Co. v. Mathews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609 ..... 15, 61

Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817 ..... 17, 67

Arbuckle v. Blackburn, 191 U. S. 405, 24 Sup. Ct. Rep. 148, 48 L. ed. 239 12

Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1 ..... 18, 72

B

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357 ..... 9, 11, 15, 21, 26, 61, 62

Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. Rep. 689 10

Bratton v. Chandler, 260 U. S. 110, 67 L. ed. 157 ..... 13, 52

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678 ..... 17, 69

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829 ..... 18, 73

Brazee v. Michigan, 241 U. S. 340, 36 Sup. Ct. Rep. 561, 60 L. ed. 1034 ..... 14, 59

Brodnax v. Missouri, 219 U. S. 285, 31 Sup. Ct. Rep. 238, 55 L. ed. 219 ..... 12, 14, 60

C

Chicago R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. Rep. 275, 55 L. ed. 290 ..... 10, 28

Compagnie Francaise v. La. State Board of Health, 186 U. S. 380, 22 Sup. Ct. Rep. 811, 46 L. ed. 1209 ..... 11, 29

Crossman v. Lurman, 192 U. S. 189, 24 Sup. Ct. Rep. 234, 48 L. ed. 401 ..... 12, 46

Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559, 37 Sup. Ct. Rep. 224, 61 L. ed. 493 ..... 12, 51

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 38 Sup. Ct. Rep. 295, 62 L. ed. 632 ..... 18, 75

Page

Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. Rep. 294, 57 L. ed. 565 ..... 18, 75

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996 11

D

Davis v. Virginia, 236 U. S. 697, 35 Sup. Ct. Rep. 479, 59 L. ed. 795 ..... 18, 75

Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. Rep. 649, 54 L. ed. 965, 28 L. R. A. (N. S.) 264 ..... 18, 75

E

Escanaba Co. v. Chicago, 107 U. S. 678, 28 Sup. Ct. Rep. 185, 27 L. ed. 442 ..... 9, 21, 24

Erie R. Co. v. Williams, 233 U. S. 685, 34 Sup. Ct. Rep. 761, 58 L. ed. 1155, 12 Am. L. Rep. 637, 51 L. R. A. (N. S.) 1097 ..... 15, 32, 60

Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. Rep. 190, 55 L. ed. 129 ..... 14, 16, 59, 64

Ex parte McNeil, 13 Wall. 236, 20 L. ed. 624 11

F

Flint v. Stone-Tracey Co., 220 U. S. 107, 31 Sup. Ct. Rep. 342, 55 L. ed. 389 ..... 13, 38

Freund on Police Power, Section 272 ..... 13, 42

Federal Trade Commission Dockets Nos. 1099 and 1123 80

G

Gibbons v. Odgen, 22 U. S. 9 Wheat. 1, 203, 6 L. ed. 23, 72 .. 9, 21

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96, 100 .. 9, 21, 23

Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725 ..... 13, 52

H

Hebe Co. v. Calvert, 246 Fed. 711 ..... 9, 21, 30

Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. Rep. 1086, 41 L. ed. 166 ..... 10, 28, 55

Page

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. Rep. 140, 59 L. ed. 385 ..... 11, 12, 16, 30, 65, 66

Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. Rep. 217, 61 L. ed. 480 ..... 12, 16, 48

Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. Rep. 114, 52 L. ed. 236 64

I

International Textbook Co. v. District of Columbia, 35 App. D. C. 307 ..... 11, 17, 27

K

Kane v. N. J., 242 U. S. 160, 37 Sup. Ct. Rep. 30, 61 L. ed. 222 ..... 11, 12, 30, 65

L

Leloup v. Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, 32 L. ed. 311 ..... 9, 21

Lake Shore & M. S. R. Co. v. Ohio el rel. Lawrence, 173 U. S. 285, 19 Sup. Ct. Rep. 465, 43 L. ed. 702 ..... 12, 32

M

McCall v. California, 136 U. S. 104, 10 Sup. Ct. Rep. 881, 34 L. ed. 391, 3 Inters. Com. Rep. 181 ..... 18, 72

McQuillin Municipal Corporations, Vol. 3, p. 2230 ..... 16, 66

Martin v. Pittsburgh & L. E. R. Co. 203 U. S. 284, 27 Sup. Ct. Rep. 100, 51 L. ed. 184 10

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238 .... 16, 65

Minnesota Rate Cases (Simpson v. Shepherd), 230 U. S. 352, 33 Sup. Ct. Rep. 729, 57 L. ed. 1511, 1540, 48 L. R. A. (N. S.) 1151, Ann Cas. 1916A, 18 ..... 8, 16, 19, 22

Missouri ex rel Barrett v. Kansas National Gas Co., ... U. S. ...., 44 Sup. Ct. Rep. 544, 68 L. ed 585 ..... 9, 21

Merrick v Halsey & Co., 242 U. S. 568, 37 Sup. Ct. Rep. 227, 61 L. ed. 498 ..... 12, 14, 51, 57

Museo v. United Surety Co., 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851 ..... 14, 53

N

Page

Nashville C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. Rep. 28, 32 L. ed. 352 ..... 10, 29

New Mexico ex rel. v. Denver R. G. R. Co., 203 U. S. 38, 27 Sup. Ct. Rep. 1, 51 L. ed. 78 ..... 11, 16, 29, 67

N. Y., N. H. & H. R. Co. v. N. Y., 165 U. S. 628, 17 Sup. Ct. Rep. 418, 41 L. ed. 853 ..... 10, 31

New York ex rel. Pa. Ry. Co. v. Knight, 192 U. S. 21, 24 Sup. Ct. Rep. 202, 48 L. ed. 325 ..... 12, 33

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. Rep. 437, 38 L. ed. 269 ..... 15, 60

O

Ozan Lbr. Co. v. Union National Bank, 207 U. S. 251, 28 Sup. Ct. Rep. 89, 52 L. ed. 195 ..... 16, 63

Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49 L. ed. 224 11

P

Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732 16

Powell v. Pa., 127 U. S. 678, 32 L. ed. 253 11

Philadelphia & S. Mail S. S. Co. v. Pa. 122 U. S. 326, 7 Sup. Ct. Rep. 1118, 30 L. ed. 1200 ..... 9, 18, 21, 72

Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. ed. 223 ..... 12, 13, 41, 44

People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006 58

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 18 Sup. Ct. Rep. 862, 43 L. ed. 191 ..... 11, 16, 65, 67

Q

Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. Rep. 192, 56 L. ed. 350, 351 ..... 15, 61, 62

R

Robbins v. Taxing District, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694, 1 Inters. Com. Rep. 45 ..... 8, 17, 19, 70

Page

Re Rahrer, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572 ..... 9, 21

Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. Rep. 370, 60 L. ed. 679 ..... 15, 61

Rogers v. Arkansas, 227 U. S. 401, 33 Sup. Ct. Rep. 298, 57 L. ed. 569 ..... 18, 75

Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. Rep. 159, 51 L. ed. 295 ..... 18, 75

S

Simpson v. Shepherd, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18 ..... 8, 16, 19, 22

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819 ..... 9, 10, 21, 26, 31

Sonneborn Bros. v. Keeling, 262 U. S. 506, ... Sup. Ct. Rep. ...., 67 L. ed. 1095 8

State v. Leary, 125 Atl. (R. I.) 353 ..... 9, 21, 25

Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564, 31 L. ed. 508 ..... 10, 33, 65

Standard Home Co. v. Davis, 217 Fed. 904 ..... 12, 13, 41

Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. Rep. 501, 59 L. ed. 835 10

Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 759, 43 L. ed. 49 ..... 10, 44

Savage v. Jones, 225 U. S. 501, 321 Sup. Ct. Rep. 715, 56 L. ed. 1182 ..... 11, 47

St. Louis & I. M. & S. R. Co. v. Paul, 173 U. S. 404, 19 Sup. Ct. Rep. 419, 43 L. ed. 746 ..... 15, 60

Stoutenburg v. Hennick, 129 U. S. 141, 9 Sup. Ct. Rep. 256, 32 L. ed. 637 ..... 18, 72

Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. Rep. 576, 46 L. ed. 785 ..... 18, 74

T

Texas Transport & T. Co. v. New Orleans, 68 L. ed. Adv. Ops. 283 (Reversing 152 La. 397, 93 So. 751) 32

Page

Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. Rep. 379, 60 L. ed. 691 ..... 15, 61, 62

Transportation Co. v. Parkersburg, 107 U. S. 691, 2 Sup. Ct. Rep. 732, 27 L. ed. 584 11

U

U. S. v. Hart, Peters C. C. (U. S.) 390 ..... 10, 29

U. S. v. Union P. R. Co., 160 U. S. 1, 16 Sup. Ct. Rep. 190, 40 L. ed. 319 ..... 15, 60

W

Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454, 29 L. ed. 691 ..... 9, 17, 21, 69

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347 ..... 8, 20

Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. Rep. 934, 40 L. ed. 1105 ..... 14, 55

Western Union Telegraph Co. v. New York, 38 Fed. 552.... 10

Western Union Telegraph Co. v. New Hope, 187 U. S. 419, 23 Sup. Ct. Rep. 204, 47 L. ed. 240 17

Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. Rep. 115, 45 L. ed 194 ..... 15, 60

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 37 Sup. Ct. Rep. 623, 61 L. ed. 1181 ..... 18, 75

Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128, 45 L. ed. 186 54

Y

Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220 39

IN THE

Supreme Court

of the United States

OCTOBER TERM, 1924

No. 147

REAL SILK HOSIERY MILLS (Incorporated),
Appellant,

vs.

CITY OF PORTLAND, a Municipal Corporation; GEORGE L. BAKER, Mayor of the City of Portland; FRANK S. GRANT, City Attorney of the City of Portland; L. V. JENKINS, Chief of Police of the City of Portland; and J. S. HUTCHINSON, Inspector of Licenses of said City of Portland, Oregon,

Appellees.

Brief of Appellees

STATEMENT OF FACTS

This is a suit to enjoin the appellees from enforcing, as against the appellant, Ordinance No. 40468 of the City of Portland, Oregon, as amended by Ordinance No. 42886, relating to solicitors.

Ordinance No. 40468 is the general license

ordinance of the City of Portland. It relates to the regulation and licensing of numerous businesses and occupations and provides a penalty by fine or imprisonment, or both, for violation of its provisions. Ordinance No. 42886 added to the general ordinance a new article regulating solicitors and fixing the amount of the license fee to be paid. The amendatory ordinance is complete in itself as to the provisions involved in this suit, and for the sake of brevity the provisions of the general ordinance need not be otherwise referred to.

For the convenience of the court in saving reference to the record, we herein set out the particular sections of the amendatory ordinance involved in this suit:

"ARTICLE XLV½

"SOLICITORS

"Section 1. *Definition.* A solicitor within the meaning of this article is defined to be any person who goes from house to house or from place to place in the City of Portland, selling or taking orders for, or offering to sell or take orders for goods, wares or merchandise or any article for future delivery, or for services to be performed in the future, or for the making, manufacturing, or repairing of any article or thing whatsoever for future de-

livery, provided, however, that this article shall apply only to solicitors who demand, accept or receive payment or deposit of money in advance of final delivery.

"Section 2. *License.* It shall be unlawful for any person to act as a solicitor within the meaning and application of this article without first securing a license from the Bureau of Licenses so to do.

"Section 3. *Application—Bond.* Any person desiring a license to engage as a solicitor within the City of Portland, shall make application therefor to the Bureau of Licenses, on forms to be provided, stating the name and address of the applicant, the name and address of the person, firm or corporation which he represents, and the kind of goods offered for sale, or the kind of services to be performed. Such application shall be accompanied by a bond in the penal sum of $500.00 executed by a surety company or by two responsible freeholders residing in the City of Portland (or in lieu thereof a cash bond of equal amount), conditioned upon the making of final delivery of the goods ordered, or services to be performed, in accordance with the terms of such order, or failing therein, that the advance payment on such order be refunded. Any person aggrieved by the action of any such solicitor shall have a right of action on the bond for the recovery of money or damages, or both. Such bond shall remain in full force and effect, and in case of a cash

deposit, such deposit shall be retained by the City of Portland, for a period of ninety days after the expiration of any such license, unless sooner released by the Council.

"Section 4. *Orders.* All orders taken by licensed solicitors shall be in writing, in duplicate, stating the terms thereof and the amount paid in advance and one copy shall be given to the purchaser."

By the amendatory ordinance, also, there was inserted, in proper alphabetical order, in the schedule of fees of Section 16, Article LII of said Ordinance No. 40468, the following:

"SOLICITOR—One who demands, receives or accepts payment or deposit in advance of final delivery:

Those on foot.....	Quarterly	$12.50
	Monthly	5.00
Those using a vehicle..	Quarterly	$25.00
	Monthly	10.00"

The emergency clause on the amendatory ordinance (Section 3), reads as follows:

"Inasmuch as this ordinance is necessary for the immediate preservation of the public health, peace and safety of the City of Portland in this: That a condition now exists whereby in the past frauds have been perpetrated upon the public by certain solicitors, and which condition requires immediate rem-

edy, therefore an emergency is hereby declared to exist and this ordinance shall be in force and effect from and after its passage by the Council."

In this case there must be a clear and perfect understanding of the facts as alleged in the bill before a correct application of the law can be made. The appellant is before the court on its bill and the facts therein stated. Appellees have responded to that bill and to nothing else. Accuracy as to the facts must be observed, that the true principles of the law can be applied.

Appellant asserts that it is engaged in the manufacture of silk hosiery and transacts its business through solicitors; that it maintains a District Sales Manager's office in the City of Portland where solicitors send their orders and from such office these orders are forwarded directly to the office of appellant in Indianapolis, Indiana; that it is engaged in interstate commerce for the reason that the manufactured goods upon leaving the appellant's factory in Indianapolis, Indiana, are continually in transit until they reach the ultimate purchasers in the various states in which it transacts business, and particularly in the City of Portland, Oregon. The orders are taken upon printed forms. Copies of the forms are set out in the bill. It is alleged that the system enables appellant to

sell to its customers at practically factory cost, eliminates expense and commissions. When such orders are received they are accompanied by a small payment, differing in amount according to the character, quality and quantity of the hosiery order. The deposit made by the purchaser is retained by the solicitor as payment for his services in full and is his sole compensation. The price of ordered goods received by appellant is collected by the post office department through its "collect on delivery" system. The order form states that the mills require a deposit on each order; that the hosiery will be mailed by parcel post c. o. d. direct from the post office branch in the mills. The customer is advised, on the order form, to pay the balance due to the postman. The customer is further advised, on the order form, that the entire business of the Real Silk Hosiery Mills is conducted on the parcel post c. o. d. basis, and that its representative cannot accept the order unless the deposit is made. The customer is further advised that the mills do not accept full payment in advance. The customer is warned not to pay more than the amount of deposit printed on the order form. Three printed forms of orders are used. Prices of hosiery vary. Solicitors may be compensated as high as three dollars on a single order. There is a statement on the order form that chiffon hosiery is not guaranteed. Ladies' hosiery

only is guaranteed. There is no statement on the order blank advising the customer that the payment in advance is the compensation of the solicitor. No statement is made concerning the quality of the goods sold, save that ladies' regular hosiery carries an absolute guarantee. There is no statement as to what is meant by a guarantee, and there is no statement, on the order blank, that if goods are not as represented by solicitor, they may be returned or exchanged.

Three principal contentions are made by appellant in its bill: (1) That the ordinance is an attempted regulation of interstate commerce; (2) that the ordinance discriminates against solicitors who take a payment in advance in favor of solicitors, drummers, etc., who do not, and (3) that the license fee charged is excessive.

POINTS AND AUTHORITIES

1. It is conceded that congress alone can impose a direct burden on interstate commerce, and that the commerce clause of the constitution, of its own force, restrains the states from so doing, whether congress has acted or not.

Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 7 Sup. Ct. Rep. 592.

Minn. Rate Cases (Simpson v. Shepherd), 230 U. S. 352, 396; 57 L. ed 1511, 1540, 33 Sup. Ct. Rep. 729; 48 L. R. A. (N. S.) 1151; Ann Cas. 1916A, 18.

2. Since the police power does not admit of exact definition, each contention of conflict between the police power of the state and the powers granted to the national government must to a large extent be decided upon its own merits.

Welton v. Mo., 91 U. S. 275, 282, 23 L. ed. 347, 350.

3. There is no contention that this ordinance discriminates against merchandise because of its origin in another state.

Sonneborn Bros. v. Keeling, 262 U. S. 506, 67 L. ed. 1095.

4. In matters of local concern, the states in the exercise of their police powers, may legislate in the interest of the health, safety, morals and gen-

eral welfare of their people, and such legislation is valid notwithstanding that interstate commerce is incidentally affected thereby.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 203, 6 L. ed. 23, 72.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96, 100.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

Escanaba Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923; 5 Sup. Ct. Rep. 357.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

Philadelphia & S. Mail S. S. Co. v. Pa., 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380.

Hebe Co. v. Calvert, 246 Fed. 711.

Missouri ex rel. Barrett v. Kansas National Gas Co., 44 Sup. Ct. Rep. 544, 68 L. ed. 585.

State v. Leary, 125 Atl. (R. I.) 353, 354.

5. In matters where the local interest is paramount to the national interest, state regulations have been sustained notwithstanding the incidental interference with interstate commerce. Cases sustaining such regulations are numerous.

The following cases contain illustrations of regulations recognized to be within the state jurisdiction.

Regulations affecting public safety:

N. Y., N. H. & H. R. Co. v. N. Y., 165 U. S. 628, 41 L. ed. 853.

Hennington v. Ga., 163 U. S. 299, 317; 16 Sup. Ct. Rep. 1086; 41 L. ed. 166, 173.

Smith v. Ala., 124 U. S. 465; 8 Sup. Ct. Rep. 564; 31 L. ed. 508.

Nashville C. & St. L. R. Co. v. Ala., 128 U. S. 96; 32 L. ed. 352, 9 Sup. Ct. Rep. 28.

Chicago R. I. & P. R. Co. v. Ark., 219 U. S. 453; 55 L. ed. 290, 31 Sup. Ct. Rep. 275.

W. U. Tel. Co. v. N. Y., 38 Fed. 552.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

Martin v. Pittsburgh & L. E. R. Co., 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100.

United States v. Hart, Peters, C. C., (U. S.) 390.

Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501.

Regulations affecting public health:

Schollenberger v. Pa., 171 U. S. 1; 43 L. ed. 49, 18 Sup. Ct. Rep. 759.

Bowman v. Chicago & N. W. R. Co., 125 U. S. 465; 31 L. ed. 700, 8 Sup. Ct. Rep. 689.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357..

Powell v. Pa., 127 U. S. 678, 32 L. ed. 253.

Compagnie Francaise v. Louisiana State Board of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811.

International Textbook Co. v. District of Columbia, 35 App. D. C. 307.

Inspection laws:

New Mexico ex rel v. Denver & R. G. R. R. Co., 203 U. S. 38, 27 Sup. Ct. Rep. 1, 51 L. ed. 78.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345; 43 L. ed. 195.

Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Regulations as to pilotage:

Ex parte McNeil, 13 Wall. 236, 20 L. ed. 624.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996.

Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49 L. ed. 224.

Regulations with reference to special facilites provided:

Transportation Co. v. Parkersburg, 107 U. S. 691; 27 L. ed. 584; 2 Sup. Ct. Rep. 732.

Kane v. N. J., 242 U. S. 160; 61 L. ed. 222, 37 Sup. Ct. Rep. 30.

Hendrick v. Md., 235 U. S. 610; 59 L. ed. 385, 35 Sup. Ct. Rep. 140.

Regulations designed to prevent fraud and deceit:

Plumley v. Mass., 155 U. S. 461, 15 Sup. Ct. Rep. 154; 39 L. ed. 223.

Broadnax v. Mo., 219 U. S. 285, 55 L. ed. 219.

Hall v. Geiger-Jones Co., 242 U. S. 539; 61 L. ed. 480; L. R. A. 1917F, 514.

Merrick v. Halsey & Co., 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227.

Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559, 37 Sup. Ct. Rep. 223, 61 L. ed. 493.

Arbuckle v. Blackburn, 191 U. S. 405, 24 Sup. Ct. 148, 48 L. ed. 239.

Crossman v. Lurman, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. ed. 401.

Standard Home Co. v. Davis, 217 Fed. 904.

Regulations affecting public convenience:

Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence, 173 U. S. 285; 43 L. ed. 702; 19 Sup. Ct. Rep. 465.

New York ex rel. Pa. R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325; 24 Sup. Ct. Rep. 202.

Automobiles:

Hendrick v. Md., 235 U. S. 610; 59 L. ed. 385, 35 Sup. Ct. Rep. 140.

Kane v. N. J., 242 U. S. 160; 61 L. ed. 222, 37 Sup. Ct. Rep. 30.

6. The declaration of the law-making power as to the purpose of the law, is entitled to much weight.

Flint v. Stone-Tracey Co., 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342.
Freund Police Power, p. 260.

7. The constitution of the United States does not secure to anyone the privilege of defrauding the public.

Plumley v. Mass., 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. ed. 223.

8. Legislation to prevent crime is of greater benefit to society than punishment of the offender after the crime has been committed, and effective legislation to prevent frauds can be provided only by the state.

Standard Home Co. v. Davis, 217 Fed. 904.
Freund Police Power, Sec. 272, page 260.

9. There is nothing new in the principle that a business may be regulated by a state on the basis of character and conduct of the persons engaged therein, and such regulations are not repugnant to the 14th Amendment.

Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725.
Bratton v. Chandler, 260 U. S. 110, 67 L. ed. 157.

10. Conduct of individuals, even in reference to matters of interstate commerce, is not, in itself, interstate commerce, and state regulations with reference thereto are valid though indirectly affecting interstate commerce.

Musco v. United Surety Co., 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851.

Western U. Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. Rep. 934, 40 L. ed. 1105.

11. It is not necessary that fraud be an incident of the business itself in order to justify a regulation designed to prevent fraud, it is enough that the business from the manner in which it is generally conducted invites and encourages fraud.

Merrick v. Halsey & Co., 242 U. S. 568, 61 L. ed. 498.

Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190.

Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95.

Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561.

Broadnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238.

12. Cost and inconvenience would have to be very great, before they could be an element in the consideration of the right of a state to exert its reserved power or its police power.

Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

U. S. v. Union P. R. Co., 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190.

St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

13. There is nothing in the constitution of the United States which forbids classification of subjects for the purpose of legislation.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Atchison T. & S. F. R. Co. v. Mathews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. .

14. The legislature of a state and likewise a municipality in carrying out the objects intended to be accomplished by legislation may make discriminations if founded on distinctions which are not unreasonable or purely arbitrary.

Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. Rep. 192, 56 L. ed. 350, 351.

Rast v. Van Deman & Lewis Co., 240 U. S. 342, 60 L. ed. 679, 36 Sup. Ct. Rep. 370.

Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379.

Ozan Lbr. Co. v. Union County National Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89.

Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. Rep. 114, 52 L. ed. 236.

Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. Rep. 190, 55 L. ed. 129.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

15. The question of the amount of the fee is primarily for determination by the council rather than by the courts, so long as the fee is reasonable and fixed according to some uniform, fair and practical standard.

Encyclopedia of United States Sup. Ct. Rep., Vol. 7, p. 875-877.

Hendrick v. Md., 235 U. S. 610; 59 L. ed. 385; 35 Sup. Ct. Rep. 140.

Parkersburg & O. River Transportation Co. v. Parkersburg, 107 U. S. 691; 27 L. ed. 584; 2 Sup. Ct. Rep. 732.

Minn. Rate Cases, 230 U. S. 352; 57 L. ed. 1511; 48 L. R. A. (N. S.) 1151; 33 Sup. Ct. Rep. 729.

N. Mex. ex rel. McLean v. D. & R. G. R. R. Co., 203 U. S. 38, 51 L. ed. 78.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 355; 43 L. ed. 195, 18 Sup. Ct. Rep. 862.

McQuillin on Mun. Corporations, Vol. 3, p. 2230.

Western Union Tel. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204..

Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. Rep. 817, 47 L. ed. 995.

16. In the absence of proof to the contrary, it will be assumed that a license fee is proportionate to the amount of municipal supervision required.

International Text-Book Co. v. Distict of Columbia, 35 App. D. C. 307.

Western Union Tel. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204.

17. The regulatory fee charged under this ordinance is not of the same character as the license fees exacted in the so-called "Drummer Cases," for in those cases the legislature imposed a direct property tax, or an excise tax, a privilege tax, an occupational tax, a sales tax, a gross receipts tax, or a direct tax of some nature upon the business or upon the property moving in interstate commerce.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

Robbins v. Taxing District of Shelby County, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118.

Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1.

Stoutenburg v. Hennick, 129 U. S. 141, 9 Sup. Ct. Rep. 256, 32 L. ed. 637.

McCall v. California, 136 U. S. 104, 3 Inters. Com. Rep. 181, 34 L. ed. 391, 10 Sup. Ct. Rep. 881.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

Davis v. Virginia, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. Rep. 479.

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. ed. 632, 38 Sup. Ct. Rep. 295.

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623.

Rogers v. Arkansas, 227 U. S. 401, 57 L. ed. 569, 33 Sup. Ct. Rep. 298.

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294.

Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649.

ARGUMENT

DOES ORDINANCE VIOLATE INTERSTATE COMMERCE CLAUSE?

At the very threshold of this matter the appellees, freely, concede that congress, alone, can impose a direct burden on interstate commerce, and that the commerce clause of the constitution, of its own force, restrains the states from so doing, whether congress has acted in the matter or not.

Robbins v. Taxing District, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 1 Inters. Com. Rep. 45, 30 L. ed. 694.

Minn. Rate Cases (Simpson v. Shepherd), 230 U. S. 352, 396; 57 L. ed. 1511, 1540; 33 Sup. Ct. Rep. 729; 48 L. R. A. (N. S.) 1151; Ann. Cas. 1916A 18.

If this were the whole conclusion of the matter, we would not presume to take the time of this court, or of any court, to argue this case. But there is a point to which a state legislature may go without infringing upon the province of congress. The line of demarcation between cases where the state is authorized to act, in the absence of congressional legislation, and those cases where the states are precluded from acting by mere force of the commerce clause, is not always clearly defined. And this will always be so, and questions of this nature will continue to arise for the reason

that the police power, from its very nature, is incapable of exact definition or limitation. It reaches out generally to control everything which affects the health, peace, safety and morals of the people, and as new conditions arise, and as public opinion creates new standards of valuation, it will reach out in a never ending procession of legislative enactments to cope with the situation. It is inevitable that contention will arise as to the power of the states and the power of the national government. Hence, each individual case must, to a large extent, be decided upon its own merits.

Welton v. Missouri, 91 U. S. 275, 282; 23 L. ed. 347, 350.

Speaking generally, a state—and in the term "state" we include the municipality exercising police powers of the state—in the absence of national legislation, may constitutionally impose taxes, exact inspection laws, quarantine laws, and generally laws of internal police. This rule is subject to the proviso, however, that such local legislation must not discriminate against merchandise because of its origin in another state; Sonneborn Bros. v. Keeling, 262 U. S. 506, 67 L. ed. 1095—a situation which does not appear in this case.

The interest which the state is authorized to protect under its reserved police power is the local interest, as distinguished from matters of national

scope, and the state may by appropriate legislation protect such local interests. Such legislation is valid under the commerce clause of the national constitution notwithstanding that interstate commerce may to some extent be affected or interfered with thereby.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 203, 6 L. ed. 23, 72.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96, 100.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

Escanaba Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185.

Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

Philadelphia & S. Mail S. S. Co. v. Pa. 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

Leloup v. Mobile, 127 U. S. 640, 32 L. ed 311, 8 Sup. Ct. Rep. 1380.

Hebe Co. v. Calvert, 246 Fed. 711.

Missouri ex rel. Barrett v. Kansas National Gas Co., 44 Sup. Ct. Rep. 544, 68 L. ed. 585.

State v. Leary, 125 Atl. (R. I.) 353, 354.

In the case of Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 203, 6 L. ed. 23, 72, involving the power

of the state of New York to grant to certain persons exclusive navigation of all the waters within its jurisdiction, Chief Justice MARSHALL said:

> "In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

In the Minn. Rate Cases, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, involving a conflict between the province of the state and of the national government in the fixing of railroad rates, Mr. Justice HUGHES said:

> "The grant in the constitution of its own force, that is, without action by congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated

at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when congress does act, the exercise of its authority overrides all conflicting state legislation."

Speaking in Gilman v. Philadelphia (3 Wall. 713, 18 L. ed. 96, 100), Mr. Justice SWAYNE said:

"The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states.

"Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated. Pilot laws are regulations of commerce; but if a state enacts them in good faith, and not covertly for another purpose, they are not in conflict with the power 'to regulate

> commerce' committed to congress by the constitution. Cooley v. The Wardens, etc., 12 How. 319."

In Escanaba Co. v. Chicago (107 U. S. 678, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185), Mr. Justice FIELD says:

> "But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other state, and is more directly concerned for the prosperity of the City of Chicago, for the convenience and comfort of its inhabitants and the growth of its commerce."

A statute of the State of Rhode Island (Laws 1912, Chap. 807, Sec. 4), providing for the prevention of smoke nuisances, and subjecting to fine any person hindering inspection of engines and boilers, was recently held valid by the Supreme

Court of Rhode Island and not violative of the commerce clause of the constitution as applied to a dredge used in the navigable waters of the state.

State v. Leary, 125 Atl. 353, 354.

The language of the court expresses the principle:

> "The statute complained of was enacted in pursuance of the police power, a domain which is reserved to the states and denied to the United States government, and the act is not invalid unless it, in some way, infringes some right secured to the national government by the federal constiution. Keller v. U. S. 213 U. S. 138, 29 Sup. Ct. 470, 53 L. ed. 737, 16 Ann. Cas. 1066. The defendant admits that the regulation attempted is not over a subject national in character, requiring uniformity of regulation because affecting all states alike, and hence exclusively within the domain of the federal government (see County of Mobile v. Kimball, 102 U. S. 691, 26 L. ed. 238) but that the subject is local in character and is open to state legislation unless the federal government by congressional legislation covering the field has acted. See Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442.
>
> "Congress has provided, merely as a safety measure, a system for the compulsory inspection of boilers, but the national government has made no regulation for the purpose of

preventing or sanctioning a smoke nuisance in the navigable tidal waters, which are a part of, and subject to the jurisdiction of a state. It would be difficult to frame a satisfactory general regulation of the subject, applicable alike to all the various navigable waters within the separate states. There is very little if any necessity for regulation of the subject in a large part of the navigable waters of many states, but the right of regulation in a small harbor located in the center of a thickly settled community is as great as on land. In the absence of action by the national government to the contrary a state may, within and over the navigable waters subject to its jurisdiction, do many things which not only regulate but impede navigation."

In Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, Mr. Justice FIELD wrote:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

And again, in Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, 820, the same learned justice says:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution."

Authorities can be multiplied without number upon the principle contended for. Multitudinous decisions, not all of them uniform, have been handed down upon the subject. Where the courts have had difficulty, however, has not been so much in the fundamental principles involved as in their application to the particular facts, and the construction of the various statutes and ordinances under consideration.

Under point 5 of our authorities, we have collated a few of the leading cases on various phases of legislation which have been declared within the reserved powers of several states, and not in conflict with the federal constitution as a regulation of interstate commerce. A brief review of a few of these cases is illuminating.

In International Textbook Co. v. District of Columbia, 35 App. D. C. 307, it was held that a pro-

vision of the police regulations of the District of Columbia making it unlawful to scatter papers or circulars or advertising matter of any kind in such a manner as to litter the streets, was a proper exercise of the police power and not an unlawful interference with interstate commerce as applied to a foreign corporation doing business in the District, although engaged in interstate commerce.

A statute of Arkansas prescribed a minimum of three brakemen for freight trains of not more than 25 cars. This was held not an invalid regulation as applied to railroads engaged in interstate commerce.

Chicago R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275.

A statute of Georgia made it unlawful to run a freight train on Sunday. This was held not an unconstitutional regulation of interstate commerce.

Hennington v. Ga., 163 U. S. 299, 16 Sup. Ct. Rep. 1086, 41 L. ed. 166.

A statute of Alabama providing certain physical qualifications for persons engaged in railroading and providing for an examination and forbidding employment of any person who did not have a certificate of fitness from the Board of Examiners, was held valid notwithstanding that

the persons affected were engaged in interstate commerce.

Nashville C. & St. L. R. Co. v. Ala., 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. Rep. 28.

An ordinance of Philadelphia, general in its nature, limiting the speed of vehicles, was held to apply to vehicles carrying United States mails.

U. S. v. Hart, Peters C. C. (U. S. 390).

A territory may, in the exercise of its police powers, prevent common carriers from receiving for transportation, beyond the limits of the territory, hides which do not bear the required evidence of inspection.

New Mex. ex rel. v. Denver & R. G. R. Co., 203 U. S. 38, 27 Sup. Ct. Rep. 1, 51 L. ed. 78.

In the exercise of its police power to prevent the spread of infectious or contagious diseases, a state may empower its board of health to exclude healthy persons from a locality infested with contagious diseases, whether they come from within or without the state.

Compagnie Francaise, etc. v. La. State Board of Health, 186 U. S. 380, 22 Sup. Ct. Rep. 811, 46 L. ed. 1209.

A law of Ohio providing for the manufacture and sale of condensed milk from skimmed milk

was held not inoperative, because the milk was properly labeled under the national pure food and drug act and shipped into the state in interstate commerce.

Hebe Co. v. Calbert, 246 Fed. 711.

Even as to automobiles operated in interstate commerce a state statute in the absence of federal legislation on the subject is valid which imposes reasonable registration fees for the use of automobiles on the highways of the state.

Hendrick v. Maryland, 235 U. S. 610; 59 L. ed. 385; 35 Sup. Ct. Rep. 140.

Kane v. N. J., 242 U. S. 160; 61 L. ed. 222; 37 Sup. Ct. Rep. 30.

In Hendrick v. Maryland, 235 U. S. 610, (59 L. ed. 285, 391, 35 Sup. Ct. Rep. 140), Mr. Justice McREYNOLDS says:

> "In the absence of national legislation covering the subject the state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse power of the engines—a practical measure of size, speed and difficulty of conrtol. This is but

an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct or material burden on interstate commerce."

A statute of the State of New York forbade, under penalty, the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom. This was held a valid regulation as applied to railroads engaged in interstate commrece.

N. Y., N. H. & H. R. Co. v. N. Y., 165 U. S. 628; 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

A statute of Indiana provided that when the death of one is caused by the wrongful act or omission of another, the personal representative of the deceased might maintain an action against the person at fault, if the deceased might have maintained an action, had he lived, against such person for injury caused by the same act or omission. This statute was held applicable to persons engaged in interstate commerce.

Sherlock v. Alling, 93 U. S. 99; 23 L. ed. 819.

A statute requiring semi-monthly payment of railroad employes is not repugnant to the commerce clause as applied to the employes of a railroad engaged in interstate commerce.

Erie R. Co. v. Williams, 233 U. S. 685; 34 Sup. Ct. Rep. 761, 58 L. ed. 1155; 12 Am. L. Rep. 637; 51 L. R. A. (N. S.) 1097.

A statute of Ohio requiring trains to stop at towns of a certain size is not invalid as applied to trains engaged in interstate commerce.

Lakeshore & M. S. R. Co. v. Ohio ex rel. Lawrence, 173 U. S. 285; 43 L. ed. 702; 19 Sup. Ct. Rep. 465.

In Texas Transport & T. Co. v. New Orleans, 68 L. ed. Adv. Ops. 283, decided by this court February 18, 1924, the appellant was engaged in business as a steamship agency in the City of New Orleans. It represented exclusively, steamship lines engaged in interstate commerce, on a commission basis. The question was whether it was subject to a license tax of $400.00 per year imposed by the city. While holding that the interstate character of its business rendered it immune to local taxation, this court, speaking through Mr. Justice Southerland, declares that the case is a border line case. We refer to this case because it (New Orleans v. Texas Transport & T. Co., 152 La. 397, 93 So. 751) was cited by the appellee in the court below prior to its reversal by this court. We desire, however, to call the court's attention to the fact that the annual license of $400.00 levied by

the City of New Orleans was a revenue measure, and not in any sense a regulatory license, as in the instant case.

On the other hand in New York ex rel. Pa. Ry. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202, it was held that a franchise tax imposed under New York statutes upon the Pennsylvania Railway Company for carrying on a cab service wholly within the state, for the purpose of conveying its passengers to and from its ferry landing in New York City, and charges for which were entirely separate from those for other transportation, was not an unconstitutional burden on interstate commerce but a tax upon an independent local service preliminary or subsequent to any interstate transportation.

The situation presented by the case at bar, is not dissimilar in principle, to those cases where persons engaged in interstate transportation are required by the provisions of state statutes to be examined and licensed. The leading case is Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564, 31 L. ed. 508. A statute of Alabama required locomotive engineers to be examined and licensed. It created a board of examiners and exacted a regulatory license fee of $5.00. It was asserted that the act requiring locomotive engineers engaged solely in interstate transportation to pay for and take out

a license before engaging in the business of interstate commerce was void. The state asserted that the statute was a police regulation for public safety and only incidentally affected interstate commerce. The statute was sustained on that principle. The court said:

> "No objection to the statute, as an impediment to the free transaction of commerce among the states, can be found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant. The fee of $5.00 to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required, before obtaining his license, to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer; and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate.
>
> "Certainly it is the duty of every carrier when engaged in the domestic commerce of the State or in interstate commerce, to provide and furnish itself with locomotive engineers

of this precise description, competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss is caused, the carrier, no matter in what business engaged, is responsible according to the local law admitted to govern in such cases, in the absence of congressional legislation.

"The statute in question further provides that any engineer licensed under the Act shall forfeit his license if at any time found guilty, by the board of examiners, of an act of recklessness, carelessness or negligence, while running an engine, by which damage to person or property is done, or who shall immediately preceding or during the time he is engaged in running an engine be in a state of intoxication; and the board is authorized to revoke and cancel the license whenever they shall be satisfied of the unfitness or incompetency of the engineer by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it. The eighth section of the Act declares that any engineer violating its provisions shall be guilty of a misdemeanor, and upon conviction inflicts upon him the punishment of a fine not less than $50 nor more than $500, and also that he may be sentenced to hard labor for the county for not more than six months.

"If a locomotive engineer, running an engine, as was the petitioner in this case, in the

business of transporting passengers and goods between Alabama and other States, should, while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passenggers carried, he might certainly be held to answer to the criminal laws of the State if they declare the offense in such a case to be manslaughter. The power to punish for the offense after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offense.

"It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a state, and by the authority of its laws and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the guage, the char-

acter of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not per se regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the constitution."

The foregoing cases disclose the wide scope of the police powers reserved to the state in matters of local import. The principle of law upon which these cases is based, is clear enough. The problem is not one of definition but of application and the question before this court is, does this particular enactment of the City of Portland transcend the limits of the city's power?

A presumption may and should be indulged in that a statute was enacted in good faith for any of the purposes for which the police power can be exercised. The declared purpose of the act is to be accepted as true unless incompatible with its meaning and effect. Mr. Justice DAY in Flint vs. Stone-Tracey Co., 220 U. S. 107, 55 L. ed. 389, 411, 31 Sup. Ct. Rep. 342, said:

> "While the mere declaration contained in a statute that it should be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless a declaration of the law-making power is entitled to much weight, * * *"

It was contended by the appellant in the court below, and will undoubtedly be contended here, that the real purpose of the ordinance is to discriminate against non-resident manufacturers in favor of local business. There is absolutely nothing in the language of the ordinance to justify such a contention, nor is there any allegation in the bill upon which to base such a claim. The ordinance in its operation, without discrimination affects all persons alike whether they be the solicitors of a local concern, or of a concern engaged in interstate or foreign commerce.

It is not alleged nor has appellant at any time claimed, that the ordinance has been administered, or is being administered with an unequal hand, so as practically to make discriminations against non-resident manufacturers. See Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. ed. 202, 6 Sup. Ct. Rep. 1064.

The declared purpose of the ordinance is to prevent the perpetration of fraud upon the citizens of the City of Portland by fraudulent or irresponsible solicitors. It is not aimed at any individual, firm or corporation. It is not aimed at anything which is the subject of trade or commerce. It does not discriminate against the goods of the State of Indiana, of which appellant is a resident, or of any other state. It does not interfere in any way with the free intercourse in goods of a sister state, nor does it interfere, except in an indirect and incidental manner, with the contract for the sale of such goods. It is aimed solely, at fraudulent practices of such a nature that they are necessarily of a *local* and not of a national character. When a citizen of the City of Portland is defrauded by a solicitor, it is evidently a matter for the local authorities or for the local courts, if perchance they may be so fortunate as to be able to lay their hands upon the illusive individual committing the fraud or other offense. Usually such frauds and practices are

perpetrated upon persons of limited means and in such small amounts in any individual case as to render the remedy furnished by the local courts of little or no avail. Or too often the solicitor is beyond the reach of the local courts and his principal is thousands of miles away. The defrauded citizen is as effectively without a remedy as if the law furnished none. These are facts of such notoriety that this court is justified in taking judicial notice of them.

It would seem, not only within the power of the state, to legislate for the prevention of such frauds upon its citizens but it would seem its positive duty to devise some method for reaching the evils of a system so freighted with opportunities for fraudulent practices. The system is enlarging in its scope from year to year. The tendency, today, is to eliminate the middle man entirely. This may be well enough, but the system has built up an immense business in soliciting which is practically the only business of that character which is unregulated and unrestricted. For years individulas, engaged in soliciting for non-resident principals, have successfully hidden behind the provisions of the federal constitution, and it has prevented legislation designed to reach solicitors of local concerns because of the inequality of such a measure. Undoubtedly congressional inaction is expressive of its will that such busi-

ness, so far as its national aspects are concerned, shall be free and unrestricted, but the states should not be thus hindered from regulating it in its local aspects. Local authority, only, can effectively deal with such a situation. It is said in Plumley vs. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. ed. 223:

> "The constitution of the United States does not secure to anyone the privilege of defrauding the public."

Preventive measures are of infinitely greater benefit to society than an uncertain criminal or civil process, after the damage is done.

As was observed by the Court in Standard Home Co. vs. Davis, 217 Fed. 904:

> "Experience has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies by extravagant expenditures for salaries, agents' commissions, and other apparently legitimate purposes through officers who had practically nothing invested in the association, and whose character and reputation stamped them as adventurers and cheats. Such regulations are proper and wholesome. The dockets of the national courts have been crowded for the last few years with criminal prosecutions of persons charged with the use of the mails of the United States in carrying out fraudulent

schemes by so-called investment companies and persons offering allurements to get rich quick. But those courts are only clothed with jurisdiction to prosecute those who, in carrying out their fraudulent schemes, make use of the mails, and then only after the commission of the offense. This necessarily affects only a small portion of those engaged in such schemes and can in no wise act as a preventative. The states alone can provide for the prevention and punishment of all who commit fraud, although the mails are not used for their accomplishment, and enact laws to prevent the commission of these crimes. Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer. Statutes enacted for such purposes ought not to be declared invalid by the courts upon slight grounds, evén if extreme cases can be imagined where they may work an injustice."

Mr. Freund in his work on Police Power, Sec. 272, page 260, upon the subject of protection against fraud and preventive measures against fraud, states:

"The private and the criminal law as well as the police power undertake to afford protection against fraud. They deal, however, with fraudulent practices only by remedial relief, treating a transaction as void or setting it aside, giving a claim for damages or inflict-

ing a penalty after the fraud has been committed. In either case the element of fraudulent intent is essential. The police power attempts to give an ampler protection both by adopting precautionary measures and by forbidding certain practices irrespective of an actual intent to defraud. It does not in the first instance punish fraud, but prescribes regulations and punishes their violation. The intervention of the law proceeds upon the theory that every one who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension. Where the confidence of the public is invited to an exceptional degree, the regulations may be made specially stringent, on the ground that the business is affected with a public interest."

Beginning with Anglo-Saxon times and even forming a part of the Magna Charta, legislation for the prevention of fraud was enacted concerning weights and measures, inspection laws, legislation providing preventive measures against substitutes, imitations and adulterations. All of this legislation was designed to prevent fraud being perpetrated upon the public. The operation of the police power where it is intended to prevent deception is well illustrated by the decisions of this court relative to statutes dealing with oleo-

margarine. The hostility of the dairy interests throughout the country brought about legislation against the manufacture of oleomargarine. In Schollenberger vs. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 759, this court held that while the legislative policy of the state of Pennsylvania prohibiting the manufacture of oleomargarine was exclusive as to domestic manufacture and sale, it could not extend to interstate commerce and that such legislation could not prevent the importation of pure oleomargarine into the state of Pennsylvania or its sale therein in original packages.

However, in the State of Massachusetts the legislation against oleomargarine took a different course. The statute of Massachusetts prohibited the sale of oleomargarine in that state when colored in imitation and semblance of yellow butter by an addition of ingredients changing its natural color. This prohibition was recognized as valid by this court in the case of Plumley vs. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. ed. 223, and this case has ever since been recognized as the leading authority on the subject of the power of the state to legislate in the interests of protecting its citizens from fraud and deception, and that freedom of commerce among the states does not demand a recognition of the right to

practice fraud or deception upon the public in the sale of any article, even though that article may be the subject of interstate commerce.

It was not contended in that case that the coloring matter was unhealthful, but the decision is based, solely, upon the ground that the public may be deceived by the appearance of the oleomargarine to purchase the same believing it to be butter. We quote from the language of Mr. Justice HARLAN in that case:

> "It has therefore been adjudged that the states may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people, may be done by the states in the exercise of the right of self-defense. And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use and eagerly sought by people in every condition of life, are protected by the Constitution in making a sale of it against the will of the state in which it is offered for sale, because of the circumstance that it is in an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of the

opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the states are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. A state enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States nor, in any just sense, interfere with the freedom of commerce among the several states. It is legislation which 'can be most advantageously exercised by the states themselves.' "

In Crossman vs. Lurman, 192 U. S. 189, 24 Sup. Ct. Rep. 234, 48 L. ed. 401, a statute of New York

prohibited the sale of any adulterated food or drug. Food was to be considered as adulterated within the meaning of the act "if it be colored or coated, or polished or powdered, whereby damage is concealed, or it is made to appear better than it really is or of greater value." It was held that this did not violate the commerce clause of the federal constitution but was a valid exercise of the police power of the state for the benefit of the people in the prevention of fraud and deception.

In the case of Savage vs. Jones, 225 U. S. 501, 32 Sep. Ct. Rep. 715, 56 L. ed. 1182, a statute of Indiana fixed a prescribed standard and required an inspection of "concentrated commercial feeding stuff" before its sale in the state, and the affixing of a stamp to each package as evidence of inspection, and forbade, under penalty, the sale of any such article not so inspected. Suit was brought to enjoin enforcement of the statute and among other things it was claimed that the law violated the commerce clause of the constitution. In upholding the statute Mr. Justice HUGHES says:

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals—a matter of great importance to the people of the state. Its requirements were directed to that end, and

> they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food."

The principle of these cases has been followed a number of times by this court with reference to the introduction and sale, in a state, of securities, when the "blue sky" legislation of a number of states came before this court, on the basis of their interference with the powers granted to the federal government by the constitution. The leading case, on this subject, is Hall vs. Geiger-Jones Co., 242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217. In this case it was held that congressional inaction leaves the state free to impose such an indirect or incidental burden on interstate commerce as may result from the provisions of a state statute forbidding dealers from disposing of, or offering to dispose of, corporate securities with in the state, without first having obtained a license from a specified state official. The language of this decision is squarely in point and is applicable to the ordinance here in question. Mr. Justice McKENNA said:

> "The next contention of appllees is that the law under review is a burden on interstate commerce and therefore contravenes the commerce clause of the constitution of the United States. There is no doubt of the su-

premacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation, but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. So much is a truism; there can only be controversy about its application. The language of the statute is: 'Except as otherwise provided in this act, no dealer shall, within this state dispose' of certain securities 'issued or executed by any private or quasi public corporation, copartnership or association (except corporation not for profit) * * * without first being licensed so to do as hereinafter provided.'

"The provisions of the law, it will be observed, apply to dispositions of securities within the state, and while information of those issued in other states and foreign countries is required to be filed (Sec. 6373-9), they are only affected by the requirement of a license of one who deals in them within the state. Upon their transportation into the state there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect

burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidently. (Citing authorities).

"We might, indeed, ask, 'When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the state?' Material things, choses in possession, pass out of interstate commerce when they emerge from the original package Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the state. We ask again, 'Do they never pass out of interstate commerce? Have they always the freedom of the state? Is there no point of time at which the state can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subject to the jurisdiction of the state only when they are attempted

to be sold to the individual purchaser?' The questions are pertinent, the answer to them one way or the other, of consequence; but we may pass them, for, *regarding the securities as still in interstate commerce after their transportation to the state is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute.*"

The holding of this case was reaffirmed by the court in Merrick vs. Halsey & Co., 242 U. S. 568, 37 Sup. Ct. Rep. 227, 61 L. ed. 498, wherein the "blue sky" law of Michigan was in question as to its being in conflict with both the commerce clause and the 14th Amendment, and it was again reaffirmed in the case of Caldwell vs. Sioux Falls Stock Yards Co., 242 U. S. 559, 37 Sup. Ct. Rep. 224, 61 L. ed. 493, in which case the same questions were raised and decided.

We conclude from these cases that in the absence of national legislation a state statute, or municipal ordinance, designed to prevent fraudulent practices or fraudulent representations, is a valid exercise of the police power of the state in the interests of the local welfare, notwithstanding that the articles affected are articles of commerce and that interstate commerce is indirectly affected or burdened thereby. The fraud which the ordinance in question seeks to prevent is es-

sentially a local matter and even though the act of soliciting may be an incident of interstate commerce, the indirect burden placed thereon by the ordinance does not contravene the commerce clause of the constitution. The provisions of the ordinance are reasonably adaptabled to accomplish the purpose intended to be accomplished, and of bringing about a correction of this evil. The requirement of a bond insures the continuance in business of persons of character and responsibility only. The ordinance should be an assistance to commerce rather than a hindrance or burden thereon, by eliminating the dishonest solicitor. The manufacturer and the honest solicitor doing business in this method, should not be heard to object to such a safeguard. It serves a double purpose. It protects the manufacturer and the honest solicitor against the dishonest solicitor, and assures the customer that his deposit is protected. This should be a selling point in favor of the licensed solicitor.

The ordinance has to do with *conduct* not directly connected with any subject of commerce. There is nothing new in the principle that the personnel of business may be regulated on the basis of character and conduct.

Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725.

Bratton v. Chandler, 260 U. S. 110, 67 L. ed. 157.

Conduct of individuals is not a subject of interstate commerce. It is purely a matter of local import, and its regulation a subject of the local police power.

After diligent search we have found but one case construing a statue in any degree similar to the ordinance in question.

Musco v. United Surety Co., 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851.

In that case a statue of New York (Chap. 185, Laws 1907) entitled, "An Act to regulate the taking of deposits by certain persons, firms and corporations," provided:

> "All corporations, firms and persons now or hereafter engaged in the selling of steamship or railroad tickets for transportation to or from foreign countries, who in conjunction with said business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof to foreign countries, shall, before entering into said business or before continuing said business, except as hereinbefore provided, make, execute and deliver a bond to the people of the State of New York in the sum of fifteen thousand dollars, conditioned for the faithful holding and transmission of any money, or the equivalent thereof which shall be delivered to it or them for transmission to a foreign country."

The Supreme Court of New York sustained this law as against the contention that it violated the interstate commerce clause of the federal constitution. We quote the language of the court in 134 Am. St. Rep. 855:

> "It applies to the act of receiving on deposit moneys to be transmitted some time in the future, and it is perfectly clear that great opportunity for fraud and loss would arise in connection with these deposits which were withdrawn from the observation and custody of the depositor on a promise at some time in the future to transmit them, and that it was the intent of the legislature to guard against the embezzlement or loss even by ignorance on the part of the banker of these moneys pending the proposed subsequent transmission. The acts of receiving the deposits and of subsequently transmitting them, although they may be related, are still entirely distinct.
>
> "The authority amongst the cases called to our attention which seems most nearly to fit the facts in this case is that of Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128, 45 L. ed. 186. That case presented for consideration the act of the state of Georgia whereby a specific tax was levied upon the occupation of 'immigrant agent,' meaning a person engaged in hiring laborers within the state, but to be transported and employed beyond its limits, and it was held that the levy of this tax did not amount to such an interference

with the freedom of transit or of contract as to violate the federal constitution.

"It is doubtless true that this statute regulating the receipt of deposits may incidentally and indirectly affect the business of transmitting moneys abroad. But it is well settled that the law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the federal jurisdiction or strictly a regulation of interstate commerce, but is to be considered as an ordinary police regulation and therefore not invalid: Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. Rep. 1086, 41 L. ed. 166."

This ordinance is not distinguishable in principle from the law of Georgia which was the subject of the decision in the case of Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. Rep. 934, 40 L. ed. 1105, wherein it was provided that "every electric telegraph comppany with a line of wires, wholly or partly in this state, and engaging in telegraphing for the public, shall during the usual office hours, receive despatches whether from other telegraph lines or from individuals; and, on payment of the usual charges according to the regulation of such company, shall transmit and deliver the same with impartiality and good faith and with due diligence under penalty of $100, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, etc."

Suit was brought agains the plaintiff in error to recover the statutory penalty for failure to promptly deliver a telegraphic despatch. Mr. Justice PECKHAM, after carefully reviewing the decisions of this court relative to the transmission of messages in interstate commerce, comes to this conclusion:

> "While it is vitally important that commerce between the states should be unembarrassed by vexations state regulations regarding it, yet on the other hand there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statue in question is one of that class, and in the absence of any legislation by Congress the statue is a valid exercise of the power of the state over the subject."

We cannot distinguish the principle involved in these cases from the principle involved in the case at bar.

DOES ORDINANCE VIOLATE 14TH AMENDMENT?

Reasonableness of Ordinance.—The bill alleges that the ordinance offends against the 14th Amendment, (Transcript of Record, page 6.) This point was not seriously urged in the court below, and we do not believe it will be seriously urged here. We are laboring at some disadvantage in not having before us a copy of appellant's brief and we are to some degree compelled to anticipate what arguments may be advanced. It was, however, argued below that the ordinance was unreasonable, that honest business should not be burdened because of the happening of an occasional fraud, and that fraud was not incidental to the business of soliciting. Mr. Justice McKENNA in Merrick v. Halsey & Co., 242 U. S. 568, 37 Sup. Ct. Rep. 227, 61 L. ed. 498, so fully answers these contentions that we quote at length from his language in that case, (61 L. ed., page 509):

> "It burdens honest business, it is true, but burdens it only that, under its forms, dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function. It costs something to be governed.

"But counsel say that the conditions imposed either are not adequate to such purpose or transcend what is necessary for it. Indeed, it is asserted that the statute has not that purpose, 'but rather to prevent financial loss.' The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from Sec. 8 or other provisions which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared purpose and as a whole, not from detached portions which can be easily overwhelmed when assigned a false character.

"It is, however, said that, assuming the statute have such purpose, the fraud referred to is not a proper object for the police power, and it is asked, 'Can the occasional fraud, that fraud which arises in the individual transaction, justify a law regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business,—a fraud which the business itself, from its character and the manner in which it is generally conducted, invites and encourages?' And, quoting from People ex rel, Tyroler v. Warden, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006: 'It is a novel legislation, indeed, that attempts to take away from all the people the right to conduct a

business because there are wrongdoers in it.' To the latter we say the right to do business is not taken away; the other we have already answered and need only add that we cannot, upon such considerations, limit the power of the state. The state must adapt its legislation to evils as they appear, and is not helpless because of their forms.

"Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, was not decided because fraud was incidental to the business of banking by individuals or partnerships, but because fraud could be practiced in it, and that hence it could be licensed. Nor was it decided in Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137, that the transfer of patent rights was of itself illegal, or that any particular transfer would be deceptive, but that some transfers might be; and so a statue of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid. Nor did we hesitate to hold valid the regulation of the business of employment agencies. It was a lawful business and would not in instances be injuriously conducted; but in instances it might be, and because it might be, with injurious consequences, its regulation was provided. This court sustained the regulation and the condition that it was to be enforced according to the legal discretion of a commissioner. Brazee v. Michigan, 241 U. S.

340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561. See also Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238."

Cost and Inconvenience—The mere fact that appellant's solicitors may suffer some cost and inconvenience is no argument against the ordinance (if such a question can be raised by appellant). It has been held by this court many times that cost and inconvenience would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power.

Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 Sup. Ct. Rep. 761.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

U. S. v. Union P. R. Co., 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190.

St Louis & I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

Reasonableness of Classification—Appellant further alleges in the bill that the ordinance discriminates against solicitors who demand and accept money in advance of delivery in favor of those who do not and that such classification is unreasonable and denies to the appellant the equal protection of the law. As we have heretofore

pointed out, the ordinance is aimed at abuses arising out of the collection of money in advance by solicitors. Solicitors doing business in this manner stand in a class by themselves and the evil which the ordinance is designed to remedy does not exist as to those solicitors who do not receive money in advance of delivery. To hold that this classification is improper because it does not include other solicitors, would be to defeat the very object of the ordinance.

There is nothing in the constitution of the United States which forbids classification of subjects for the purpose of legislation.

Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923.

Atchison T. & S. F. R. Co. v. Mathews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The legislation of a state and likewise a municipality in carrying out the objects intended to be accomplished by legislation may make discriminations if founded on distinctions which are not unreasonable or purely arbitrary.

Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. Rep. 192, 56 L. ed. 350, 351.

Rast v. Van Deman & Lewis Co., 240 U. S. 342, 60 L. ed. 679, 36 Sup. Ct. Rep. 370.

Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379.

In Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, Mr. Justice FIELD, says:

> "Class legislation discriminating against some and favoring others is prohibited but legislation which in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." (14th Amendment).

In Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. Rep. 379, 60 L. ed. 691, Mr. Justice McKENNA says:

> "Classification is not different in law than other departments of knowledge. 'It is the grouping of things in speculation or practice because they agree with one another in certain particulars.' (Citing authorities). Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object."

In Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup.. Ct. Rep. 192, 56 L. ed. 350, a statute of Montana regulating a laundry business exempted from its operation steam laundries and women engaged in the laundry business where not more than two women were employed. This was held by Mr. Justice Holmes to be a valid classification, the Court saying:

"* * * The 14th Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which the difference should be emphasized by legislation are largely in the power of the state."

In Ozan Lbr. Co. v. Union County National Bank, 207 U. S. 251, 28 Sup. Ct. Rep. 89, 52 L. ed. 195, a law of Arkansas which exempted merchants and dealers who sell patented articles in the usual course of business, from provisions requiring a negotiable instrument taken in payment for a patented article to show on its face for what it was given, or be void, was held by this Court not repugnant to the 14th Amendment, the Court saying:

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

In Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. Rep. 114, 52 L. ed. 236, a statute of North Dakota required certain paints to be labeled and exempted other paints. In holding this law valid as against the complaint that it violated the 14th Amendment, Mr. Justice McKENNA remarks:

> "Legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable."

In Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. Rep. 190, 55 L. ed. 129, a law of New York licensing private bankers exempted from its operation those private bankers in whose business the average amount of each sum received, was not less than $500.00 and those who gave a bond in a specified amount. This was held to be a valid classification, the Court saying:

> "But the former of these exceptions has a manifest purpose to confine the law as nearly as may be to the class thought by the legislation to need protection, and the latter merely substitutes a different form of security, as well it may. 'Legislation which regulates business may well make distinctions depend upon the degree of evil.' "

There is a multitude of other cases holding that there must be great freedom of discretion in the

legislative body in the matter of classification, even though it may result in ill-advised, unequal and oppressive legislation.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

License Fee—The question of the license fee is of secondary importance. That provision will stand or fall with the rest of the ordinance. If this ordinance is within the powers of the City of Portland, it will not be contended that a reasonable regulatory license fee may not be exacted. In many of the cases considered in this brief where state regulations requiring licenses or inspection, were questioned, the question of a license fee and the amount thereof was involved. In Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564, 31 L. ed. 508, above referred to, where locomotive engineers engaged in interstate commerce were required to be examined and licensed by the provisions of the law of Alabama, a license fee of $5.00 was exacted. In Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 285, 35 Sup. Ct. Rep. 140, involving the licensing of automobiles engaged in interstate transportation, the question of a license fee was involved. Likewise in Kane v. New Jersey. 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30.

In Patapsco Guano Co. v. Board of Agriculture,

171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862, a state statute imposing an inspection fee of 25 cents per ton was held valid. Many other cases are to the same effect.

Amount of License Fee—So far as the amount of the fee charged is concerned, that is a question for the legislative body of the city and not for the courts, so long as it is not so unreasonable and disproportionate as to serve to open it to attack on the question of good faith. As stated by Judge McQUILLIN in Municipal Corporations, Vol. 3, page 2230:

> "The sound judicial view is that much should be left to the discretion of the municipal authorities. Where under undoubted charter power, the tax is imposed for revenue alone, or for police regulation and revenue, the amount thereof is usually a matter for determintion by the legislative branch of the municipal government. Ordinarily the courts will decline to interfere on the ground that the amount is oppressive or unreasonably large. They incline to defer to the judgment and discretion of the corporate authorities, and frequently presume that the amount demanded is reasonable, particularly in the absence of evidence to the contrary."

In Hendrick v. Maryland, 235 U. S. 610, 57 L. ed. 385, 35 Sup. Ct. Rep. 140, it is said:

"The amount of the charges and the method of collecting are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. * * *The action of the state must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facilities supplied by the state, the cost of maintaining them or the fairness of the methods adopted by collecting the charges imposed; and we cannot say from a mere inspection of the statutes that its provisions are arbitrary or unreasonable."

In New Mexico ex rel. McLean v. D. & R. G. R. R. Co., 203 U. S. 38, 27 Sup. Ct. Rep. 1, 51 L. ed. 78, it is said:

"The law being otherwise valid the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law." (Citing Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345-350, 43 L. ed. 191-193, 18 Sup. Ct. Rep. 862).

In Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. Rep 817, 47 L. ed. 995, this court says:

> "When it (the license tax) is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and, if it were possible to prove in advance the exact cost, that would be the limit of the tax. In the nature of things, that, however, is ordinarily impossible; and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses."

It is not apparent that the amount of the license fee in the present case is so unreasonable and disproportionate as to serve to open it to attack on the question of good faith. The city is entitled, under these authorities, to make the charge large enough to cover the cost and any reasonable anticipated expenses, taking into consideration the difficulty encountered in keeping persons of this character, wondering from one portion of the city to the other, under observation, together with the expense of supervising, the issuance of licenses and the expense thereof, it cannot be said that the fee charged is unreasonable.

The Drummer Cases. We anticipate that great reliance will be placed by the appellant upon the so-called Drummer Cases in this court, as was the case in the lower court and we, therefore, wish to distinguish those cases and the laws upon which they were based from the instant case and the ordinance of the City of Portland here in question.

Decisions affecting drummers, solicitors, agents, brokers, canvassers and peddlers, are numerous. Upon examination of all the cases it will be found that in every instance where the court declared a statute or ordinance void as interfering directly with interstate commerce, the legislature imposed a direct property tax or an excise tax or a privilege tax, or an occupation tax or a sales tax, a gross receipt tax, or a direct tax upon the property moving in interstate commerce. It would be an imposition on the time of the court to undertake to discuss every case. We content ourselves with taking up for discussion for the purpose of differentiation, only, those decisions which are deemed as leading cases on the points involved in the instant case. We do this because great reliance in both of the lower courts was placed by appellant on such cases.

In Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678, an act of the legislature required all importers of foreign goods, by the bale or package, and all persons selling the same by wholesale to take out a license. Chief Justice Marshall held that a tax on the sale of an article imported only for sale was a tax on the article itself; that it was an occupation tax on the importer.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, involved a tax in Michigan on

persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors to be shipped into the state, not having their principal place of business in the state, without imposing the same tax on persons engaged in the same business in the state. The court held it void as interfering with interstate commerce. The distinction we draw in the case at bar is clearly pointed out by Justice Bradley in the Michigan case, when he said:

> "It is suggested by the learned judge who delivered the opinion of the supreme court of Michigan in this case, that the tax imposed by the Act of 1875 is an exercise by the legislature of Michigan of the police power of the state for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature."

Robbins v. Taxing District of Shelby County, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, was decided subsequently to the Missouri case and is now regarded as the one leading case upon the principles here involved. There was an agreed statement of facts as follows:

> "Sabine Robbins is a citizen and resident

of Cincinnati, Ohio, and on the .... day of ....., 1884, was engaged in the business of drumming in the Taxing District of Shelby County, Tenn., i. e. soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or Taxing District police force and carried before the Hon. D. P. Hadden, president of the Taxing District, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' is engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the Taxing District of Shelby County, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest."

The statute expressly provided: "All drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein, by sample, shall be required to pay to the county trustee the sum of ten dollars per week or twenty-five dollars per month for such privi-

lege." The act itself expressly provided that it was a *privilege tax.* The court on that account held it void as to drummers engaged in interstate commerce.

Other cases followed the Robbins case, among them being the case of Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118, wherein the State of Pennsylvania levied a tax on gross receipts derived from transportation of persons and property, by sea, between different states and foreign countries.

Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1, was a case wherein a state statute required from "every commercial traveler, drummer, salesman or solicitor of trade, by sample or otherwise, an annual occupation tax." The statute, itself, provided that the tax was an occupation tax.

Stoutenburg v. Hennick, 129 U. S. 141, 9 Sup. Ct. Rep. 256, 32 L. ed. 637, involved an act of the legislative assembly of the District of Columbia which levied an occupation tax on drummers.

In McCall v. California, 136 U. S. 104, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881, 34 L. ed. 391, it appeared that McCall was an agent in San Francisco engaged in soliciting business for an Eastern railroad company, but not engaged in selling tick-

ets for that company, or receiving or paying out money on its account. The City of San Francisco enacted an occupation license tax on many occupations, including a railroad agency. The court held the act void as to interstate commerce on that ground.

In Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, was again presented the question of the validity of an ordinance providing "that all persons canvassing or soliciting, within said city (of Titusville), orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay the said treasurer therefor the following sums, according to the time for which said license shall be granted," and also prescribing a penalty for failing to procure such license. An agreed statement of facts showed that Shepard was a manufacturer of picture frames and maker of portraits, residing in Chicago in the State of Illinois, of which state he was a citizen, and in which state he had his manufactory and place of business; that in the prosecution of his business he employed agents, who, under his directions, solicited orders for pictures and picture frames in the state of Pennsylvania and in other states of

the Union, by going personally to residents and citizens of said state of Pennsylvania and other states, and exhibiting samples of his pictures and frames, going, when necessary, from house to house; that Brennan was an agent of the said Shepard, employed by him to travel and solicit orders for pictures and frames, upon a salary; that upon receiving orders for pictures and picture frames, the agents of Shepard forwarded the same to him at Chicago, where the goods were made, and from there shipped to the purchasers in Titusville by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shepard, at Chicago; that Brennan, the agent employed by Shepard, was engaged in conducting the business in the manner stated, at the time of his arrest, and acting solely for Shepard.

Upon such a state of facts, and upon a review of the cases, this court held it was not bound by the decision of the highest court of the state in which such a tax was authorized and imposed that such a tax was an exercise of the police power, and not of the taxing power; and that the ordinance in question imposed a tax upon interstate commerce, and was therefore void.

In Stockard v. Morgan, 185 U. S. 27, 46 L. ed.

785, 22 Sup. Ct. Rep. 576, there was considered the validity of a statute of Tennessee providing, on its face, for a privilege tax on the occupation of a merchandise broker as it was declared void on that ground as to interstate commerce.

Davis v. Virginia, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. Rep. 479, involved an occupation or peddlers' tax and, as to interstate commerce, transactions, was declared void.

In all of the foregoing cases, the legislation involved no thought of a regulation to prevent fraud, deceit or misrepresentation. Every case involved a *tax* as distinguished from a *regulatory license.*

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. ed. 632, 38 Sup. Ct. Rep. 295, involved an excise tax.

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623, involved a privilege tax.

Rogers v. Arkansas, 227 U. S. 401, 57 L. ed. 569, 33 Sup. Ct. Rep. 298; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649, all involved occupation or privilege taxes.

In conclusion, we respectfully urge that the ordinance of the City of Portland here in question does not offend against Section 8, Article I, of the Constitution, nor against the 14th Amendment, for the reason that it meets a situation essentially local in character, that it does not directly burden interstate commerce and that it is an exercise of the police power reasonably adapted to the ends intended to be accomplished.

The ordinance applies to all types and classes of solicitors, irrespective of where the goods they offer for sale are manufactured and irrespective of where the books, periodicals or newspapers they solicit subscriptions for are printed.

No attempt is made by the ordinance to discriminate between goods manufactured in this state as against those manufactured in other states, or publications printed in this state as against those printed in other states.

The court will take judicial knowledge of the fact that the system employed by the appellant gives extensive opportunities for the commission of fraud in the sale of all classes of goods, especially in cases where, as alleged in appellant's bill, the solicitor selling the merchandise receives his compensation by means of an advance payment. By this system the principal has no direct

control over the solicitor. The solicitor is free to come and go as he will. The principal has no interest in the solicitor whatsoever except to receive his orders and apparently has no means of knowing what its solicitor is doing so far as the advance payment is concerned.

Contention may be made that where a customer is dissatisfied or has been cheated he or she may complain to a district manager and he will adjust matters. That may be true as to appellant, but there are manufacturers employing the system who have no representatives in the city. The manufacturer is thousands of miles away and, under such circumstances, the customer cannot afford to carry on a controversy. The manufacturer may be an honest and legitimate business house, manufacturing an honest product, yet its product, in the hands of dishonest solicitors under its sales system, induces and actually brings about fraudulent practices; this, through no fault of the manufacturer and, it may be, after every reasonable precaution is taken, but by reason of the system.

The system, itself, induces fraudulent practices. The glib solicitor, bent on making his commission, can and does make false statements and representations as to the character and quality of the goods he offers for sale.

And, again, it is a matter of common knowledge to all of us that there is the type of solicitor operating in our cities claiming to represent a manufacturer when, in fact, he is not such representative. This type of solicitor is daily defrauding the public. He always collects a deposit in advance. It is likewise a matter of common knowledge to all of us that there is a type of solicitor who states that he represents a certain manufacturer when in truth and in fact there is no such manufacturer. He always collects a deposit in advance.

It is also a matter of common knowledge to all of us that there is the type of solicitor who claims to represent manufacturers, which manufacturers do not sell their product by the same system employed by appellant, yet, this solicitor utilizes the system, takes an order, collects a dollar and disappears or perchance fills the order with inferior goods. It is a matter of common knowledge in the manufacturing trade world that manufacturers, who sell their goods only through retail stores, have spent thousands and thousands of dollars in calling the public's attention, through the medium of newspapers and magazines, to the operations of these bogus solicitors.

It is a matter of common knowledge that in the sale of silk hosiery there is a great opportunity for

solicitors to make misrepresentations as to the quality and the character of the goods manufactured. The average woman knows that full fashioned hosiery is more desirable than tubular knit hosiery. Many of them, however, do not know how to distinguish between a hose with a mock seam in the back and the genuine full fashioned hose. A genuine full fashioned hose is always made with a seam extending down the back and under the foot. In a mock seam hose the mock seam will be found to stop just above the base of the heel and the foot will be seamless. This difference opens the way for a solicitor to make misrepresentation. The solicitor may offer for sale hosiery stating that it is real silk or pure silk, whereas such hosiery is not wholly composed of silk but the top, toe and heel are of cotton and the sole of a mixture of cotton and silk.

What is true as to silk hosiery is also true as to underwear, particularly in representing a garment to be made of pure silk, when in truth and in fact artificial silk is used; or that a yarn is silk lisle when in truth and in fact there is no such yarn. And what is true as to hosiery and true as to underwear, is true as to all other manufactured articles.

The manufacturers themselves, no doubt, are not always free from blame for this situation. The

names used, the type of advertising, and the representations made therein, all tend to assist in the wrong. The use of the words "silk," "silk chiffon," "pure silk" and "pure thread silk" as applied to hosiery are generally misleading. See Records Federal Trade Commission against Durable Pure Silk Fashioned Hosiery, Inc., Docket 1099, May 8, 1924.

The appellant itself, indeed, is under citation before the Federal Trade Commission partly upon this basis. Federal Trade Commission Records, Docket 1123. However, appellee does not claim to be able to reach this situation which is of national, rather than of local, significance.

Scope of National Legislation. There is no legislation, by the national government, which reaches the field in which this ordinance operates. Congress has attempted to curtail dishonesty by the enactment of legislation preventing the use of the United States mails for fraudulent purposes. The remedy afforded by this enactment, however, is applicable only to fraudulent schemes employing the use of the mails. Solicitors of the type covered by this ordinance seldom, if ever, use the mails.

In September, 1914, congress created the Federal Trade Commission whose jurisdiction is sole-

ly confined to investigating and preventing nationally unfair methods of competion in commerce. The scope and powers of the Federal Trade Commission are specifically limited to the investigation and prevention of unfair methods of competition in national commerce. Jurisdiction of this body is not broad enough to deal with local conditions, if, indeed, it is a matter for the federal government at all.

In view of the facts, and in the light of the foregoing authorities, we respectfully submit, that the ordinance of the City of Portland, here in question, is a valid and constitutional exercise of the police power of the State of Oregon, exercised through the municipality, and that it does not directly burden or interfere with interstate commerce, nor enter a field which has been entered by congress to the exclusion of the state, nor is the ordinance repugnant to the 14th Amendment to the Federal Constitution.

Respectfully submitted,

FRANK S. GRANT, *City Attorney,*

ROBERT A. IMLAY, *Deputy City Attorney,*

Solicitors and Attorneys for Appellees.

No. 417.

IN THE

Supreme Court of the United States

REAL SILK HOSIERY MILLS, INCORPORATED,
Plaintiff and Appellant,

vs.

CITY OF PORTLAND, Defendant and Appellee.

APPEAL FROM CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION OF THE CURTIS PUBLISHING COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

and

BRIEF.

JAMES WILSON BAYARD,
RALPH B. EVANS,
Attorneys for The Curtis Publishing Company,
1335 Land Title Building,
Philadelphia, Pa.

Allen, Lane & Scott, Prs., Philadelphia.

In the Supreme Court of the United States.

OCTOBER TERM, 1924. No. 417.

Real Silk Hosiery Mills, Inc., Plaintiff and Appellant,

vs.

City of Portland, Defendant and Appellee.

PETITION OF THE CURTIS PUBLISHING COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

TO THE HONORABLE, THE CHIEF JUSTICE AND JUSTICES OF THE SAID COURT:

The petition of The Curtis Publishing Company respectfully showeth:—

Your petitioner, The Curtis Publishing Company, is a Pennsylvania corporation, having its principal office in the City of Philadelphia. It publishes The Ladies' Home Journal, The Saturday Evening Post and The Country Gentleman. These publications all have a wide circulation throughout the United States, the actual circulation, according to the last available figures, being:—

The Ladies' Home Journal, issue of February, 1925 ..... 2,393,601 copies
The Saturday Evening Post, issue of February 28, 1925 ..... 2,501,302 copies
The Country Gentleman, issue of February 28, 1925 ..... 820,407 copies

This wide circulation has been built up through a selling organization which has been established and maintained by The Curtis Publishing Company as the result of many years of effort and the expenditure of large sums of money. This Court is already familiar with the details of this organization in so far as it has to do with the sale and distribution of single copies. (Federal Trade Commission *vs.* Curtis Publishing Company, 260 U. S. 568.) In addition to the organization which this Court had occasion to consider in that case, the Company also maintains a large organization of subscription canvassers whose business is to solicit yearly subscriptions for the various magazines. Of the total circulation mentioned above, the portion represented by annual subscriptions was as follows:—

The Ladies' Home Journal	1,189,427
The Saturday Evening Post	704,466
The Country Gentleman	716,033

The number of subscription canvassers employed by the petitioner in this work is approximately 75,000. In the City of Portland alone there are over 200. For the most part these canvassers are men and women who are regularly engaged in other lines of business, and who are enabled by this work to make additional money in their spare time. Every one of these canvassers is a duly authorized representative of The Curtis Publishing Company for the purpose of soliciting subscriptions and accepting payment. They are furnished by the Company with official receipt books authorizing them to accept money and give receipts on behalf of the Company.

When a subscription canvasser receives a subscription, he gives the subscriber a receipt, deducts the amount of his commission from the subscription price, and remits the balance to the office of the Company at Philadelphia, whereupon the subscription is duly entered. Instances where canvassers have failed to remit have been so rare as to be practically negligible, and in every such case the Company has recognized its responsibility and entered the subscrip-

tion. In other words, such losses fall upon the Company and not upon the subscriber.

The ordinance in question, if extended to apply to the petitioner's subscription canvassers, as under the broad language of the ordinance it might be, would require every canvasser in the City of Portland to pay an annual license fee of $50 in the case of those who work on foot, and $100 in the case of those using a vehicle, in addition to being obliged to furnish a bond in the penal sum of $500. The license fee is more than the average commission earned by the majority of subscription canvassers in a year. It is obvious that such a tax would not only be burdensome, but in most cases prohibitive and would virtually prevent the Company from soliciting subscriptions in the City of Portland and in other cities where similar ordinances have been or may be enacted.

Your petitioner therefore prays leave to file in this case a brief which is herewith submitted.

THE CURTIS PUBLISHING COMPANY,
By
M. E. DOUGLAS,
Circulation Manager.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.

M. E. DOUGLAS, being duly sworn, says that the facts set forth in the foregoing petition are true.

M. E. DOUGLAS.

Sworn to and subscribed before me this 23rd day of April, 1925.

ELIZABETH P. PRICHARD
Notary Public.

My commission expires on the 6th day of March 1927

In the Supreme Court of the United States.

OCTOBER TERM, 1924. No. 417.

Real Silk Hosiery Mills, Inc., Plaintiff and Appellant,

vs.

City of Portland, Defendant and Appellee.

BRIEF ON BEHALF OF THE CURTIS PUBLISHING COMPANY.

The Circuit Court of Appeals has sustained the validity of the ordinance substantially upon two grounds: First, that it is not a direct burden upon interstate commerce, and Second, that it is a reasonable exercise of the local police power. Neither of these conclusions we submit is tenable under the facts set forth in the bill of complaint, which are to be taken as admitted for the purpose of this case.

I. THE ORDINANCE IS A DIRECT BURDEN UPON INTERSTATE COMMERCE.

The Circuit Court of Appeals has said that as the ordinance applies only to the solicitors and not to the appellant itself, and as the solicitor's connection with any sale terminates upon his receipt of the deposit made by the purchaser, it involves no interference with the interstate business carried on by the appellant. In other words, the Cir-

cuit Court of Appeals has divided the transaction resulting in a sale made by the appellant to a resident of Portland into two transactions, first the solicitation of the sale and the receipt of the deposit by the solicitor, and second the transmission of the order by the district sales manager and the delivery of the goods. From this premise it concludes that the first part of the transaction is wholly intrastate, and therefore a proper subject to local regulation.

The fallacy of this proposition has been well pointed out in the appellant's brief at pages 31 to 36. By the same reasoning almost every transaction involving interstate commerce might be resolved into several elements, some of which would be performed wholly within the state, but we submit that the true test is whether the transaction as a whole is one involving interstate commerce, and if it is, any local regulation which unreasonably interferes cannot be sustained upon the ground that in terms it affects only that part of the transaction which is performed wholly within the state. The solicitors in this case are agents of the appellant for the purpose of securing orders. Their function cannot logically be disassociated from the sales which result from their solicitation. They are an integral part of the machinery which carries on an interstate business.

> "The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce."
>
> Robbins *vs.* Shelby Taxing District, 120 U. S. 489 at page 497.

Following this case, it has been held in a long line of decisions by this Court that the solicitation of business by travelling salesmen or drummers is protected under the Commerce Clause from unreasonable local interference.

Certainly no real distinction is to be found in the fact that in this case the solicitor receives his commission in the

form of a payment made on account by the purchaser at the time the order is taken. The solicitor is just as much an instrument in the furtherance of the sale as if he received his compensation in some other form, and the argument that his connection with the transaction ceases when the order has been received would apply equally to a travelling salesman or a drummer. In other words, the reasoning of the Circuit Court of Appeals would apply equally well to cases such as this Court had under consideration in the Robbins case and those which have followed it, and is wholly at variance with the principles underlying the decisions in those cases.

2. THE ORDINANCE IS NOT JUSTIFIED AS A POLICE MEASURE.

The fact that the ordinance declares that an emergency exists and that it is necessary for the immediate preservation of the public health, peace and safety of the City of Portland, is not conclusive upon this Court.

> "This Court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form."
>
> Lacoste *vs.* Dept. of Conservation, 263 U. S. 545, at page 550.

While it must be conceded that the states have a right in the legitimate exercise of their police powers, to legislate on subjects relating to the health, life and safety of their citizens, even though such legislation may indirectly affect interstate commerce, it is clear that the present ordinance cannot be justified upon this ground. Speaking of

a similar ordinance, this Court said in Stoutenburg *vs.* Hennick, 129 U. S. 141, at page 148:—

> "The business referred to is thus definitively assigned to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. Cooley *vs.* Board of Wardens, 12 How. 299; Gilman *vs.* Philadelphia, 3 Wall. 713. It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality."

In Brennan *vs.* Titusville, 153 U. S. 289, it was attempted to justify a similar ordinance upon the ground that it was a legitimate exercise of the police power and intended to protect against fraud. In disposing of this argument, the Court said, page 302:—

> "Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate com-

merce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a direct burden on interstate commerce is not open to question."

If the real purpose of the ordinance is to protect people against fraudulent solicitors, it is not easy to see how this is accomplished by the exaction of a license fee or why, if that be the sole purpose of the ordinance, the license fee should be heavier in the case of solicitors using a vehicle, than in the case of those on foot. The ordinary and effective way to prevent such frauds is by criminal prosecutions. The denomination of the ordinance as a measure intended to protect the public health, peace and safety of the City is obviously a disguise intended to cloak what is in effect a tax measure and a direct burden on interstate commerce.

JAMES W. BAYARD,
RALPH B. EVANS,
Attorneys for The Curtis Publishing Company.

Office Supreme Court,
FILED
APR 27 192
WM. R. STANSBU
CLE

Supreme Court of the United States.

OCTOBER TERM, 1924. No. 617.

REAL SILK HOSIERY MILLS, INCORPORATED,
Plaintiff and Appellant,

against

CITY OF PORTLAND, A MUNICIPAL CORPORATION, *et al.*, ETC.,
Defendants and Appellees.

APPEAL FROM CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF OF AMICUS CURIAE.

DAVID PAINE,
Amicus Curiæ.

WHITE & CASE,
14 Wall Street,
New York.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States.

REAL SILK HOSIERY MILLS, INCORPORATED,
Plaintiff and Appellant,

AGAINST

CITY OF PORTLAND, a municipal corporation, *et al.*, etc.,
Defendants and Appellees.

BRIEF OF DAVID PAINE, *AMICUS CURIÆ*, IN SUPPORT OF APPEAL.

Statement.

The appellant here seeks to enjoin the City of Portland, Oregon, from enforcing an ordinance. This ordinance, in sum, applies to solicitors who receive advance payments from customers. It requires of them (1) a license fee of from $5 to $10, if paid monthly, and (2) a bond for $500, executed by either a surety company, or by two responsible freeholders of Portland (or a cash bond of equal amount) as security for final delivery of the goods, or in lieu thereof, for return of the advance payment. The question is, whether the ordinance is a valid exercise of the police power, or is an interference with interstate commerce so far as it affects the soliciting agents of corporations foreign to Oregon.

The District Court of Oregon held adversely to plaintiff on these two questions and declined to issue a decree restraining the defendants.

The Circuit Court of Appeals, in an opinion filed

April 21, 1924, by Morrow, *C. J.*, concurred in by Hunt and Rudkin, *C. JJ.*, affirmed the District Court. The essentials of the record consist of the bill and defendants' motion to dismiss, in effect for insufficiency. It is this motion, granted by Judge Bean by formal decree, dated December 24, 1923, which is before this court.

Facts Presented by *Amicus Curiæ*.

The appellant here, Real Silk Hosiery Mills, Incorporated, is engaged in selling articles of wear. This ordinance, however, affects any business, no matter where located, which depends on agents and solicitors in Portland for obtaining orders, provided a deposit is required at the time of the order.

The attention of the court is particularly called to the situation so far as it concerns magazine publishers. A fact so well known that this court may take judicial cognizance of it, is, that subscriptions to magazines are obtained almost entirely through solicitors who collect a part, if not all, the subscription price of one or several magazines for a year in advance. Where several magazines are sold together at a slight reduction under their combined cost, such an arrangement is called a "Club" subscription.

It seems also a fit subject for judicial notice that these soliciting agents are, in a vast majority of cases, school boys, teachers and others who are seeking to eke out a livelihood by obtaining orders for magazines and periodicals during off hours. Little consideration is needed to convince anyone that these classes of subscription agents, operating without capital, and required to obtain payment of subscriptions in advance, will disappear with the

enforcement of the onerous conditions of the ordinance.

Magazines sold by the year are always cheaper to the subscriber than by the copy, but subscriptions must be paid in part, at least, in advance. It would be entirely impracticable to do otherwise. Thus the securing of magazine subscriptions may come directly under the Portland ordinance.

A typical case is that of the Crowell Publishing Company, which publishes in New York and sells in Oregon, and throughout the Union, the following magazines: *Woman's Home Companion, The American, Farm and Fireside,* and *Mentor.* No subscriptions are accepted by the agent but all are forwarded to the Company's office at Springfield, Ohio, for acceptance. There the contracts are accepted or rejected. It is estimated by this corporation that a loss of subscription and advertising revenue, in case of the enforcement by municipalities generally of bond and license ordinances for canvassers, will amount to the following annually:

Circulation	$5,228,570
Advertising	5,807,259
	$11,036,029

Ordinances similar to that of Portland have been passed in the following cities:

Eugene, Oregon	Burlingame, California
Yakima, Washington	Fullerton, "
Sacramento, California	Piedmont, "
Pasadena, "	Pomona, "
Stockton, "	Richmond, "
Anaheim, "	
Minneapolis, Minnesota	Harlowtown, Montana
Clarinda, Iowa	Hammond, Louisiana
Prescott, Arizona	Lake Charles, "
Wenatchee, Washington	Bougolusa, "
Minot, North Dakota	Franklin, "
	Morgan City, "

Magazine publishers operate, in general, in a three-fold manner so far as payment by subscribers is concerned:

(*a*) The full amount of a year's subscription is payable with the order. From it the agent deducts his commission. This is the usual method.

(*b*) A deposit is taken, less than the soliciting agent's commission. He retains the deposit and is paid an additional amount by the publisher.

(*c*) The deposit goes entirely to the soliciting agent and is his sole compensation.

It will be noted that (*c*) above, is identical with the method of remunerating the canvassers for appellant here, as disclosed by the bill.

In all cases the publisher makes the solicitor its agent for that purpose, and the orders taken are transmitted to the publisher outside the state, and thereupon issues of the magazine subscribed for are sent, by mail direct to the subscriber within the State of Oregon. They go in uninterrupted interstate mail transshipment from the publisher to the subscriber.

It is the contention of the *amicus curiæ* that in such case the obtaining of the order through the soliciting agent is an indispensable element of interstate commerce and cannot be separated as an isolated transaction from the business of printing and selling periodicals. Hence, that the attempt to require of the soliciting agent a license fee and a bond for $500, is a direct burden on interstate commerce and hence unconstitutional.

I.

The ordinance, as amended, is unconstitutional so far as it applies to soliciting agents of corporations engaged in interstate commerce.

The basic question, of course, is, what is interstate commerce? This court has, since its earliest days, discussed this subject in connection with the police powers of the states, and more recently in relation to the Anti-Trust Laws.

The court in *Addystone Pipe & Steel Co.* v. *United States*, 175 U. S. 211, said:

> "As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196-203; *Kidd* v. *Pearson*, 128 U. S. 1, 20."

Clearly, then, the obtaining of orders for goods to be manufactured and shipped from another state, is an essential part of interstate commerce. The expense and attention devoted to advertising throughout the land, and the trained salesmen who are sent throughout the several states, bear witness to the importance of the soliciting agent as an element of business. So that an attempt to require a license fee from agents who obtain orders for goods moving in interstate commerce, is a direct burden upon that commerce. So, too, an attempt to require a bond to secure the carrying out of in-

terstate commerce contracts, is direct interference with interstate commerce. The relation between bond and contract could not be more direct. The condition of the bond is:

> "* * * the making of final delivery of the goods ordered, or services to be performed, in accordance with the terms of such order, or failing therein, that the advance payment on such order be refunded. Any person aggrieved by the action of any such solicitor shall have a right of action on the bond for the recovery of money or damages, or both" (Record, p. 4).

The requisite bond, then, applies directly to interstate shipment.

The Circuit Court of Appeals, in its opinion, laid stress on the fact that the purposes of the Act were benign, and that an emergency existed. But in no case has either circumstance been allowed to uphold an unconstitutional act. It is obvious too, on reflection, that the result desired can be accomplished legally.

The court dwells on the fact that a deposit is made by the purchaser, which is retained by the solicitor, in the instant case, as payment for his services in full and as his sole compensation. It then concludes that the solicitor has no further interest in the matter, and that the plaintiff has no interest in the advance payment made by the purchaser to the solicitor, and hence the transaction between solicitor and customer is an independent one and is intra-state instead of interstate.

This reasoning seems lacking in logic. Certainly, solicitors are entitled to payment for their services. The entire amount paid by the purchaser to the solicitor is credited on the purchase price for the merchandise sold by the Real Silk Hosiery Com-

pany, and whether it is used to recompense the salesman or not, is of no moment. Would the situation be different if the solicitor collected the entire price of the order from the customer and forwarded part to the manufacturer, or collected, as a deposit, less than the amount of his compensation in each case and received a small payment from the manufacturer? It is not apparent how these circumstances can change the situation. The transaction must be viewed as a whole. It is all a part, and a very essential part, of the interstate trade in the articles sold.

As pointed out in the statement herein, publishing houses selling magazines, follow the three methods outlined. It is questionable whether that in any way differentiates them from the appellant here.

Clearly the transaction between solicitor and customer has but one purpose in view, so far as the customer is concerned, *i. e.,* the obtaining of goods. He does not pay, or agree to pay, the solicitor's compensation. He simply wishes to place a binding order with the manufacturer, for delivery direct to him C. O. D., of the goods ordered. As a requisite of that transaction, he pays to the company, through its agent, a deposit. To be sure the agent, by private agreement with his company, has the right to retain it, but, so far as the transaction between company and customer is concerned, the application which the company makes of the deposit is not pertinent so long as it is credited on the purchase.

In the Circuit Court of Appeals three cases were relied upon. They are easily distinguishable.

The first is *Pennsylvania Railroad Co.* v. *Knight,* 192 U. S. 21, 27-28. In that case the Pennsylvania Railroad maintained a cab service to take passen-

gers to and from its terminal in the City of New York. New York imposed a license tax, which the Company resisted on the ground that the cab service was part of interstate commerce. It is plain that this cab service had no direct relation to the interstate transportation carried on by the Railroad. It was not a continuous, integral part of that transportation system. It was one of many local cab services available to the passengers who had completed their trip on the lines of the Pennsylvania into New York.

A very different situation had been presented if an attempt had been made by New York or New Jersey to tax the ferry boats, which, in those days, were the sole means for completion of the trip from the terminus of the Pennsylvania Railroad at Jersey City to New York City. Then interstate commerce would have been directly affected.

The recent case of *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, was cited by the court below. That case had to do with the Blue Sky Law of Ohio, wherein was provided a license tax and certain prohibitions to prevent frauds in the sale of bonds and like securities. The Geiger-Jones Company was engaged in the business of buying and selling, in Ohio, investment securities of corporations of Ohio and other states. It was attempted to upset this statute on the ground that it interfered with interstate commerce so far as it related to the sale of securities of corporations of a state other than Ohio. There was nothing to this. The shares of stock and bonds brought into the State of Ohio and there sold by the Geiger-Jones Company, were as much subject to State legislation as though Geiger-Jones were conducting a grocery and incidentally sold ripe olives from California. No one would be

heard to say, in these circumstances, that the grocer could not be regulated by municipal ordinance. The two transactions are entirely separate.

Much store, however, is set upon certain dicta in that decision where Mr. Justice McKenna said:

> "Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subjected to the jurisdiction of the State only when they are attempted to be sold to the individual purchaser?"

The question thus asked is not answered by the learned Justice. It, probably, was not even intended as dicta. It was unnecessary to a decision of the case. It could not well have been the meaning of this court to upset its authoritative opinions in *McCall* v. *California*, 136 U. S. 391, and *Texas Transport & Terminal Co.* v. *City of New Orleans*, 44 S. C. Reporter 242 (decided February 18, 1924). These cases will be presently discussed.

Very obviously it was not necessary for the court, in its opinion in the Blue Sky case, to hold that illegal interference in interstate commerce consisted of interference after the goods or choses in action had become part of the stream of transportation from one state to another. Its language, fairly construed, does not go so far. There were two independent transactions, one, the bringing of the securities into the State of Ohio, and second, the buying and selling of them there by the complainant. It was this buying and selling that was sought to be regulated. It had no direct bearing on the movement of the securities in interstate commerce, the fact that they had their origin in another state being of no moment.

With regard to the effect to be given dicta, the

familiar words of Chief Justice Marshall are of abiding force. He said in *Cohens* v. *Virginia*, 6 Wheat. 264 (399):

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

It is not necessary to give to the *obiter dicta* in the *Blue Sky* case the effect of a direct pronouncement by this court.

The same holds true of *Plumley* v. *Massachusetts*, 155 U. S. 461, the oleomargarine case. There it was logically held that a requirement that oleo be not artificially colored, unless sold under its own name, was not an interference with interstate commerce. It was notorious that oleo was being sold in imitation of dairy butter, and colored for that purpose, its normal color being different from that of butter. The State of Massachusetts required that it either be sold as oleo, even if artificially colored, or else that the coloring be omitted. This was not an interference with trade in oleomargarine, for one wishing to buy that product was not in any way restrained from doing so, nor was any attempt made to curtail orders or hamper the obtaining of orders in it. The provision simply was that it should not be sold as something else.

The cases of *McCall* v. *California, supra,* and *Texas Transport Co.* v. *New Orleans, supra,* are of controlling force here.

They contain the clear principles of *Brennan* vs. *Titusville,* 153 U. S. 289; *Robbins* vs. *Shelby Taxing District,* 120 U. S. 489, and *Ging* vs. *Michigan,* 135 U. S. 161-165.

In the *McCall* case an attempt was made to tax an agent of the Erie Railroad Company, which maintained an office and solicited business in the City of San Francisco. The Erie, of course, does not go to San Francisco. Its western terminus is Chicago. The business of the agent was to secure passengers and freight who traveled eastward from Chicago over the lines of the Erie. He was fined for violation of an ordinance requiring railroad agencies to pay a license fee. Mr. Justice Lamar said:

> "His employment was limited exclusively to inducing persons in the State of California to travel from that State into and through other States to the City of New York. To what, then, does his agency relate except to interstate transportation of persons? Is not that as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of freight from San Francisco to New York City over that line of railroad? If the business of the New York, Lake Erie & Western Railroad Company, in carrying passengers by rail between Chicago and New York and intermediate points in both directions, is interstate commerce, as much so as is the carrying of freight, it follows that the soliciting of passengers to travel over that route was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase and

> doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it therefore was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

There seems nothing whatsoever to distinguish this *McCall* case from the one at bar, except the immaterial distinction that in the instant case a deposit is paid by the customer at the time of signing the order.

The latest pronouncement by this court on the subject is *Texas, etc., Co.* v. *New Orleans, supra.* Therein the City of New Orleans sought to recover from the plaintiff a license tax of $400 upon its business as steamship agent. This was resisted as in contravention of the commerce clause of the Constitution. The plaintiff was an agent for various steamship companies and ship owners, all exclusively engaged in interstate commerce. Mr. Justice Sutherland says:

> "The service rendered consisted of soliciting and engaging cargo, * * * collecting freight charges, paying ships' disbursements, attending to immigration service, and assisting generally in matters of local customs and regulations. Freight moneys collected, after deducting commissions, were remitted to the owners or charterers."

The case, then, is directly in point, for in the *Texas* case, as here, the soliciting agent received his pay through commissions on the freight collected. The court then points out that frequent occasion has arisen to consider the effect of taxes of this char-

acter, and that this court has held that to impose a tax upon one engaged in selling the goods of a nonresident within the state, or upon persons securing the transportation of freight in interstate commerce, is unconstitutional on account of the interstate character of the business conducted This court then held that the attempt to levy the tax by the City of New Orleans was an interference with interstate commerce.

That case was based on an ordinance which provided a graduated tax, determinable by the business done. The instant case is not of that character. The tax is levied without regard to the amount of business. For instance, a school boy, obtaining a subscription for one year's issue of the *Youth's Companion,* must pay the same fee and furnish the same bond, as the largest magazine agency in the City of Portland. The tax is the same in each case. Hence the case is not at variance with the views expressed by Mr. Justice Brandeis and Mr. Justice Holmes, who dissented from the opinion of Mr. Justice Sutherland, *supra,* for in the dissenting opinion it is said:

> "On the other hand, the burden is deemed direct, where the tax is upon property moving in interstate commerce * * *; or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce."

The soliciting agents of the appellant and of the magazine publishers, in whose behalf this brief is submitted, fall directly within the last classification. They are engaged in inaugurating interstate business. They are an essential part of it, and as

much so as the transportation of the goods or magazines themselves. They are taxed indiscriminately, and the result of the tax and of the regulations will be destructive to the business of most of them.

It is difficult, then, to escape the conclusion that the ordinance in question is invalid as an interference by the state with interstate commerce and a direct burden on such commerce.

CONCLUSION.

The decree of the District Court, as affirmed by the Circuit Court of Appeals, should be reversed.

Respectfully submitted,

DAVID PAINE,
Amicus Curiæ.

04783

a license by paying a fee and filing a bond conditioned to make final delivery of ordered goods, *held* an unconstitutional interference with interstate commerce as applied to the solicitors of a corporation engaged in manufacturing goods in another State and selling them direct to consumers on orders taken by the solicitors and sent to the home office of the corporation, the customers making advance deposits which were retained by the solicitors as their sole compensation and were credited to the customers on account of their purchases. P. 335.

2. An expressed purpose to prevent possible frauds is not enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. P. 336.

297 Fed. 897, reversed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing the bill in a suit brought by the appellant corporation to enjoin the enforcement of a city ordinance requiring its salesmen to take out licenses and file bonds for security of customers.

Mr. John G. Milburn, with whom *Messrs. Joseph W. Welsh, Ralph Bamberger* and *John M. Gearin* were on the brief, for appellant.

Decisions of this Court have reduced within very narrow limits the questions raised by the record in this case. *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71; *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489, 497, 498; *Texas Transport Co.* v. *New Orleans*, 264 U. S. 150, 152; *Brennan* v. *Titusville*, 153 U. S. 289, 302.

The appellant's business which is affected by the ordinance is interstate commerce. The business consists of the obtaining of orders through representatives or solicitors in Portland from individual purchasers and the fulfillment of those orders, when received in Indianapolis, by shipment from that place direct to the purchasers in Portland. The transaction is simply a sale and delivery in one State of goods manufactured in another State

upon an order previously given and transmitted to the State in which the goods are manufactured, and is in all respects interstate commerce. *Robbins* v. *Shelby Taxing Dist., supra; Brennan* v. *Titusville, supra.* It is clear that the interstate character of the transaction as a whole cannot be affected by the manner in which the order may be obtained or by the terms of payment for the goods ordered; and it is immaterial whether they are paid for wholly or partly in advance or on final delivery insofar as the character of the transaction is concerned. In either case the transaction is interstate commerce and the representative of the appellant obtaining the order is engaged in interstate commerce.

The ordinance is a direct burden on interstate commerce and therefore invalid. *Robbins* v. *Shelby Taxing Dist., supra; Brennan* v. *Titusville, supra; Stockard* v. *Morgan,* 185 U. S. 27; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Stewart* v. *Michigan,* 232 U. S. 665; *Browning* v. *Waycross,* 233 U. S. 16; *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150; *Bowman* v. *Chicago & North Western Ry. Co.,* 125 U. S. 465; *Stoutenburgh* v. *Hennick,* 129 U. S. 141; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197. The ordinance in this case concerns only solicitors who collect any portion of the purchase price payable in advance. But the fact that a solicitor collects a portion of the purchase price in advance at the time an order is given in accordance with the terms of the order does not change his status or function with respect to the interstate sale in connection with which his service has been rendered, or the interstate character of the sale. Whether an ordinance is a direct or incidental burden on interstate sales is not determinable by how the purchase price is payable. Treating the ordinance as an attempted exercise of the police power, it is not only void as imposing a direct

burden on interstate commerce, but because it is unreasonable, arbitrary and unnecessarily burdensome. *Adams Express Co.* v. *New York*, 232 U. S. 14, 31. The direct and effective way to attack and suppress such frauds as the ordinance professes to be aimed at, is by criminal prosecutions. This Court is not bound by the recitals in the ordinance or its declared purpose. *Mugler* v. *Kansas*, 123 U. S. 623; *Dobbins* v. *City of Los Angeles*, 195 U. S. 223; *La Coste* v. *Dept. of Conservation*, 263 U. S. 545. If there be any real necessity for the regulation of solicitors selling the goods of a non-resident principal it is for Congress, and not for the various States or municipalities, to pass appropriate laws for such regulation. *Robbins* v. *Shelby Taxing Dist., supra; Stoutenburgh* v. *Hennick, supra; Lemke* v. *Farmers Grain Co., supra; Bowman* v. *Chicago & North Western Railway Co.*, 125 U. S. 465; *American Express Co.* v. *Iowa*, 196 U. S. 133; *Railroad Co.* v. *Husen*, 95 U. S. 465.

The theory of the opinion of the Circuit Court of Appeals as to the local character of the service of the appellant's solicitors is untenable. This is a clear misconception of the real transaction. The solicitors are employed by the appellant. Their function is to solicit orders on behalf of the appellant, and when obtained to reduce them to writing, sign them and receive the deposit on behalf of the appellant. The orders are transmitted to the appellant through a district sales manager's office located in the City of Portland. This is the indispensable initial step in the transaction. The total purchase price is stated in the formal order. It is the sum which the purchaser is obligated to pay to the appellant for the goods. A payment of a part of the purchase price is required in advance and is paid to the solicitor, not as money due from the purchaser to the solicitor, but as part of the purchase price of the goods. The payment required is retained by the solicitor under his arrange-

ment with the appellant as compensation for his service rendered to the appellant. That he retains it instead of remitting it to his principal does not affect the purchaser. The solicitor's part in the sale is concluded when he receives the order and advance payment and sends the order to the district sales manager just as any travelling salesman's function in connection with a sale is performed when he has obtained an order and forwarded it to his principal. There is obviously no basis in the actual facts for the statements in the opinion of the court below that the solicitor "receives nothing from the plaintiff", and "that the plaintiff has no interest in the advance payment made by the purchaser to the solicitor", or for the description of the solicitor as "independent", and his business as "independent and self sustaining"; or for severing the solicitor's service from each transaction of sale as an entirety and treating it as a separate and independent transaction between the purchaser and the solicitor.

The advance payment is necessary as an inducement to the purchaser to take the goods when delivered and pay the balance of the purchase price; and, in case of their rejection by the purchaser owing to a change of mind or any similar cause, to recoup the appellant for the selection and packing of the goods and the expense of forwarding them and having them returned. Experience has shown that it materially tends to hold the purchaser to his order. For this reason the advance payment is indispensable.

Facing the problem of the payment of the compensation of thousands of solicitors all over the country and an advance payment being indispensable, the natural solution of it was to fix the payment at a sum equivalent to a workable compensation to the solicitor in connection with each order and allow him to retain it, thereby saving an open account with each solicitor and remittances from

him and to him. It is a natural and legitimate method of business and its operation in no way converts the purely interstate sales of the business into a combination of an interstate element, consisting of the receipt of the order, the transmission of the goods by mail C. O. D. as to the balance of the purchase price, and their delivery to the purchaser on payment of such balance, and of an intrastate element consisting of the obtaining of the order by the solicitor, the forwarding of it to the district manager's office for transmission to the mills, and his retention of the advance payment on the purchase price of the goods collected by him. *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21; *Coe* v. *Erroll*, 116 U. S. 517; *Hall* v. *Geiger-Jones Company*, 242 U. S. 539; *Plumley* v. *Massachusetts*, 155 U. S. 461, distinguished. To single out solicitors who collect any portion of the purchase price in advance of final delivery and subject them to discriminating and hostile legislation is a violation of the equality clause of the Fourteenth Amendment.

Mr. Frank S. Grant, with whom *Mr. Robert A. Imlay* was on the brief, for appellees.

The police power, from its very nature, is incapable of exact definition or limitation. It reaches out generally to control everything which affects the health, peace, safety and morals of the people, and as new conditions arise, and as public opinion creates new standards of valuation, it will reach out in a never ending procession of legislative enactments to cope with the situation. It is inevitable that contention will arise as to the power of the States and the power of the national Government. Hence, each individual case must, to a large extent, be decided upon its own merits. *Welton* v. *Missouri*, 91 U. S. 275. The State may by appropriate legislation protect local interests. Such legislation is valid under the Commerce Clause notwithstanding that interstate

commerce may to some extent be affected. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Sherlock* v. *Alling*, 93 U. S. 99; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Barbier* v. *Connolly*, 113 U. S. 27; *Walling* v. *Michigan*, 116 U. S. 446; *Philadelphia etc., S. S. Co.* v. *Penna.*, 122 U. S. 326; *In Re Rahrer*, 140 U. S. 545; *Leloup* v. *Mobile*, 127 U. S. 640; *Hebe Co.* v. *Calvert*, 246 Fed. 711; *Missouri ex rel. Barrett* v. *Kansas National Gas Co.*, 265 U. S. 298; *State* v. *Leary*, 125 Atl. (R. I.) 353.

On various phases of legislation which have been declared within the reserved powers of States, and not a regulation of interstate commerce, see especially *International Textbook Co.* v. *District of Columbia*, 35 App. D. C. 307; *Chicago R. I. & P. R. Co.* v. *Arkansas*, 219 U. S. 453; *Hennington* v. *Georgia*, 163 U. S. 299; *Nashville C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96; *United States* v. *Hart*, Pet. C. C. 390; *New Mex. ex rel.* v. *Denver & R. G. R. Co.*, 203 U. S. 38; *Compagnie Francaise, Etc.* v. *Louisiana State Board*, 186 U. S. 380; *Hebe Co.* v. *Calvert, supra; Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *N. Y., N. H. & H. R. Co.* v. *New York*, 165 U. S. 628; *Sherlock* v. *Alling*, 93 U. S. 99; *Erie R. Co.* v. *Williams*, 233 U. S. 685; *Lakeshore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285; *Texas Transport & T. Co.* v. *New Orleans*, 264 U. S. 150; *New York ex rel. Pa. Ry. Co.* v. *Knight*, 192 U. S. 21.

The situation presented by the case at bar is not dissimilar in principle to those cases where persons engaged in interstate transportation are required by the provisions of state statutes to be examined and licensed. *Smith* v. *Alabama*, 124 U. S. 465. A presumption should be indulged in that a statute was enacted in good faith. The declared purpose of the act is to be accepted as true unless incompatible with its meaning and effect. *Flint* v. *Stone-Tracey Co.*, 220 U. S. 107. It will be contended, that

the real purpose of the ordinance is to discriminate against non-resident manufacturers in favor of local business. There is nothing in the language to justify such a contention, nor is there any allegation in the bill upon which to base such a claim. It is not alleged or claimed that the ordinance is administered with an unequal hand, so as practically to make discriminations against non-resident manufacturers. See *Yick Wo* v. *Hopkins*, 118 U. S. 356. The declared purpose is to prevent the perpetration of fraud upon the citizens of Portland by fraudulent or irresponsible solicitors. It does not discriminate against goods, nor interfere in any way with the free intercourse in goods of a sister state, nor, except in an indirect and incidental manner, with the contract for the sale of such goods. It is aimed solely, at fraudulent practices of such a nature that they are necessarily of a local and not of a national character.

It would seem not only within the power of the State, but its positive duty, to devise some method for reaching the evils of a system so freighted with opportunities for fraudulent practices. The system is enlarging in its scope from year to year. The tendency, today, is to eliminate the middle man entirely. This may be well enough, but the system has built up an immense business in soliciting which is practically the only business of that character which is unregulated and unrestricted. For years individuals, engaged in soliciting for non-resident principals, have successfully hidden behind the provisions of the federal Constitution, and it has prevented legislation designed to reach solicitors of local concerns because of the inequality of such a measure. It is said in *Plumley* v. *Massachusetts*, 155 U. S. 461: "The Constitution of the United States does not secure to anyone the privilege of defrauding the public." Preventive measures are of infinitely greater benefit to society than an uncertain criminal or civil process, after the damage is done.

Standard Home Co. v. *Davis*, 217 Fed. 904; Freund, Police Power, § 272, p. 260; see *Crossman* v. *Lurman*, 192 U. S. 189; *Savage* v. *Jones*, 225 U. S. 501; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539; *Merrick* v. *Halsey & Co.*, 242 U. S. 568; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559.

We conclude from these cases that, in the absence of national legislation, a state statute, or municipal ordinance, designed to prevent fraudulent practices or fraudulent representations, is a valid exercise of the police power of the State in the interests of the local welfare, notwithstanding that the articles affected are articles of commerce and that interstate commerce is indirectly affected or burdened thereby. The fraud which the ordinance in question seeks to prevent is essentially a local matter and even though the act of soliciting may be an incident of interstate commerce, the indirect burden placed thereon by the ordinance does not contravene the Commerce Clause. The provisions of the ordinance are reasonably adaptable to accomplish the purpose intended—correction of this evil. The requirement of a bond insures the continuance in business of persons of character and responsibility only. The ordinance should be an assistance to commerce rather than a hindrance or burden, by eliminating the dishonest solicitor. The ordinance has to do with conduct not directly connected with any subject of commerce. There is nothing new in the principle that the personnel of business may be regulated on the basis of character and conduct. *Gundling* v. *Chicago*, 177 U. S. 183; *Bratton* v. *Chandler*, 260 U. S. 110. We have found but one case construing a statute in any degree similar to the ordinance in question. *Musco* v. *United Surety Co.*, 196 N. Y. 459. This ordinance is not distinguishable in principle from the law of Georgia which was the subject of the decision in *Western Union Telegraph Co.* v. *James*, 162 U. S. 650.

The ordinance does not violate the Fourteenth Amendment. *Merrick* v. *Halsey & Co.* 242 U. S. 568.

Mr. David Paine filed a brief as *amicus curiae*, by special leave of Court.

Messrs. James W. Bayard and *Ralph B. Evans* filed a brief as *amici curiae*, by special leave of Court.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellant is an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Ind., and selling it throughout the United States to consumers only. It employs duly accredited representatives in many States who go from house to house soliciting and accepting orders. When a willing purchaser is found the solicitor fills out and signs in duplicate a so-called "order blank." This obligates appellant to make delivery of the specified goods and, among other things, states—

"The mills require a deposit of $1.00 [or other specified sum] on each box listed below. Your hosiery will be mailed you by Parcel Post c. o. d., direct from the Post Office branch in our mills. Pay the balance to the postman. As the entire business of the Real Silk Hosiery Mills is conducted on the Parcel Post c. o. d. basis, our representatives cannot accept your order unless the deposit is made. We do not accept full payment in advance. Do not pay more than printed deposit."

One of the copies is left with the purchaser; the other is first sent to the local sales manager and then forwarded to the mills at Indianapolis. In response thereto the goods are packed and shipped by Parcel Post c. o. d. direct to the purchaser. The solicitor retains the cash deposit, and this constitutes his entire compensation.

The appellant employs two thousand representatives who solicit in most of the important cities and towns

throughout the Union, and has built up a very large business—$10,000,000 per annum. Twenty operate in Portland, Ore.

May 16, 1923, that City passed an ordinance which requires that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond. The license fee is $12.50 quarterly for each person on foot and $25 if he uses a vehicle. The bond must be in the penal sum of $500 and conditioned to make final delivery of ordered goods, &c.

By a bill filed in the United States District Court for Oregon appellant challenged the ordinance and asked that its enforcement be restrained upon the ground, among others, that it interferes with and burdens interstate commerce and is repugnant to Art. I, § 8, Federal Constitution. The trial court upheld the enactment and sustained a motion to dismiss the bill. This was affirmed by the Circuit Court of Appeals. 297 Fed. 897.

Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Brennan* v. *Titusville*, 153 U. S. 289; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Texas Transport Co.* v. *New Orleans*, 264 U. S. 150; *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203.

"The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." Manifestly, no license fee could have been required of appellant's solicitors if they had travelled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate

The judgment of the court [illegible]

REAL SILK HOSIERY MILLS *v.* CITY OF PORTLAND ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 417. Argued April 27, 1925.—Decided May 25, 1925.

1. A municipal ordinance requiring that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure